Decision of the Competition and Markets Authority

Competition Act 1998

Supply of products to the furniture industry (drawer wraps)

Case CE/9882-16

27 March 2017

Confidential information in the original version of this Decision has been redacted from the published version on the public register. Redacted confidential information in the text of the published version of the Decision is denoted by [✂].

The names of individuals mentioned in the description of the infringement in the original version of this Decision have been removed from the published version on the public register. Names have been replaced by a general descriptor of the individual's role.

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1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1 By this decision (the 'Decision'), the Competition and Markets Authority (the 'CMA') has concluded that the following undertakings (each a 'Party', together the 'Parties') have infringed the prohibition imposed by section 2(1) (the 'Chapter I prohibition') of the Competition Act 1998 (the 'Act') and/or Article 101(1) of the Treaty on the Functioning of the European Union ('Article 101 TFEU'):

(a) BHK (UK) Limited ('BHK UK') and its parent company BHK Holz-u Kunststoff KG ('BHK KG') (together, 'BHK');

(b) Thomas Armstrong (Timber) Limited ('TATL') and its parent company Thomas Armstrong (Holdings) Limited ('TAHL') (together, 'TA').

1.2 The CMA has concluded that between April 2006 and September 2008 (the 'Relevant Period'), BHK and TA infringed the Chapter I prohibition and/or Article 101 TFEU by participating in a single continuous infringement through an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of chipboard and MDF based drawer wraps to customers in the UK (the 'Infringement').

1.3 By this Decision, the CMA is imposing financial penalties under section 36 of the Act.

2. FACTUAL BACKGROUND

A. Industry overview

Drawer wraps

2.1 The Infringement concerns the supply of drawer wraps to the bedding, office and domestic furniture industry in the UK.

2.2 A drawer 'wrap' is the name given for the sides and back of a drawer. A drawer wrap does not include the front or base of a drawer.

2.3 The Infringement concerns drawer wraps that are made from chipboard or MDF. Such drawer wraps may have a surface component, typically a plastic foil (PVC or polypropylene); they come in either three or four separate pieces, or in a single component of three or four mitred pieces; and they have dowels to fit a drawer front and a slit to fit a drawer base.[1]

2.4 The principal raw materials required for a drawer wrap's production are chipboard, foil (PVC or polypropylene), resin and dowels.[2]

2.5 A number of factors influence the pricing of drawer wraps, including: the current and expected future costs of raw materials; currency fluctuations; processing and labour costs; geography and haulage costs; quantities ordered; production capacity and availability; the financial standing and credit risk of the customer; the attractiveness of the customer (for example, in terms of potential future quantities and a long term trading relationship); the aggressiveness of the customer's purchasing team; competitor activity; possible reciprocal trade opportunities; and general company overheads.[3]

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[1] See, for example, BHK UK's response dated 20 May 2016 (as amended) to the CMA's information request dated 30 March 2016, question 3 URN H0105; transcript of an interview with [TATL senior employee 1] on [✂], page 14 URN 3008; witness statement of [DP Furniture employee] dated [✂], paragraph 3 URN 6299; witness statement of [Silentnight employee 2] dated [✂], paragraph 8 URN 11216; witness statement of [NPB employee 1] dated [✂], paragraph 2 URN 2987.

[2] See, for example, witness statement of [BHK UK employee 1] dated [✂], paragraph 3 URN 12127; transcript of an interview with [TATL senior employee 1] on [✂], pages 10-11 URN 3008; BHK UK's response dated 20 May 2016 (as amended) to the CMA's information request dated 30 March 2016, question 3 URN H0105.

[3] BHK UK's response dated 20 May 2016 (as amended) to the CMA's information request dated 30 March 2016, question 10 URN H0105; TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, questions 7 and 10 URN H0036; witness statement of [BHK UK employee 1] dated [✂], paragraph 3 URN 12127; witness statement of [TATL senior employee 2] [✂], paragraph 10 URN 2972.

2.6 There is no 'standard' drawer wrap. Customer requirements differ and prices vary from customer to customer depending on the size and type of wrap required.[4]

2.7 The CMA understands that, as of early 2006, BHK UK and TATL are the only two independent manufacturers of drawer wraps in the UK.[5] On 31 March 2006, the only other independent UK based manufacturer, LMS International Limited ('LMS'), was placed in administration; LMS was dissolved on 10 July 2007.[6] However, during the Relevant Period there was some competition in the UK from producers based outside the UK, for example in Belgium (Decruy NV), Germany, Denmark (Danfold), France and Italy.[7]

B. The Parties

BHK

2.8 BHK UK is a limited liability company registered in England and Wales, with company number 02195429. It was incorporated on 18 November 1987. BHK UK's registered address is Davy Drive, North West Industrial Estate, Peterlee, County Durham, SR8 2JF.[8]

2.9 BHK UK is a manufacturer and supplier of chipboard based drawer wraps, as well as other timber based components, to the furniture industry.[9] During the Relevant Period, BHK UK supplied drawer wraps to customers such as

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[4] Transcript of an interview with [TATL senior employee 1] on [✂], page 15 URN 3008; transcript of an interview with [BHK UK senior employee 1] on [✂], pages 193 to 194 URN 6297; witness statement of [DP Furniture employee] dated [✂], paragraph 10 URN 6299.

[5] Transcript of an interview with [TATL senior employee 1] on [✂], point 25 page 15 URN 12371; see, for example, witness statement of [DP Furniture employee] dated [✂], paragraph 4 URN 6299; witness statement of [KD Products employee] dated [✂], paragraphs 6 and 13 URN 12355.

[6] Notice of administrators appointment, Form 2.2B, as filed at Companies House; Notice of dissolution dated 10 April 2007, as filed at Companies House.

[7] Transcript of an interview with [TATL senior employee 1] on [✂], point 25, page 15 URN 12371; witness statement of [KD Products employee] dated [✂], paragraph 6 URN 12355; TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, question 6 URN H0036; BHK UK's response dated 20 May 2016 (as amended) to the CMA's information request dated 30 March 2016, question 6 URN H0105.

[8] BHK UK Annual Return dated 25 October 2015.

[9] BHK UK's response dated 20 May 2016 (as amended) to the CMA's information request dated 30 March 2016, question 2 URN H0105; http://www.bhk.uk.com/

Howden Kitchens, Hammonds, Kingstown Furniture, Gresham Office Furniture and Austin Hinkley Furniture.[10]

2.10 The directors of BHK UK throughout the Relevant Period were [✂],[✂] and [✂].[11] The current directors are [✂] and [✂].[12]

2.11 BHK UK is, and was throughout the Relevant Period, owned by BHK KG (2499998 ordinary shares), [✂] (one ordinary share), and [✂] (one ordinary share).[13]

2.12 BHK KG is an unlimited partnership formed in Germany and registered in the local court at Paderborn; it was formed on 1 January 1971 with number HRA 1267.[14]

2.13 [✂] is currently, and was throughout the Relevant Period, the sole director of BHK KG.[15]

TA

2.14 TATL is a limited liability company registered in England and Wales, with company number 00818914. It was incorporated on 9 September 1964. Its registered address is Workington Road, Flimby, Maryport, Cumbria, CA15 8RY.[16]

2.15 TATL is a manufacturer and supplier of chipboard based drawer wraps, as well as other timber based components, to the furniture industry.[17] During the Relevant Period, TATL supplied drawer wraps to customers such as Silentnight, Horatio Myer & Co Ltd, Sealy UK, Sweet Dreams (Nelson) Ltd and Nestledown Beds Ltd.[18]

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[10] BHK UK's response dated 20 May 2016 (as amended) to the CMA's information request dated 30 March 2016, question 9 URN H0105.
[11] BHK Annual Returns dated 25 October 2006, 26 October 2007 and 25 October 2008.
[12] BHK Annual Return dated 25 October 2015.
[13] BHK Annual Returns dated 25 October 2006, 26 October 2007, 25 October 2008 and 25 October 2015.
[14] URN H0682. BHK KG is engaged in the design and manufacture of products for the interior décor market, including furniture profiles, drawer components and flooring: www.bhk.de The CMA has not seen any evidence that BHK KG was itself involved in the conduct or that its director was aware of the conduct.
[15] URN H0682.
[16] TATL Annual Return dated 29 March 2016.
[17] TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, question 2 URN H0036; http://www.thomasarmstrong.co.uk/divisions/timber-division/our-products/.
[18] TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, question 9 URN H0036.

2.16 The directors of TATL during the Relevant Period were [✂], [✂], [✂] and [✂].[19]

2.17 The current directors of TATL are [✂], [✂] and [✂].[20]

2.18 TATL is, and was throughout the Relevant Period, owned by TAHL (3998 ordinary shares), and [✂] (2 ordinary shares).[21]

2.19 TAHL is a limited liability company registered in England and Wales, with company number 00244751.[22] It was incorporated on 1 January 1930. Its registered address is Workington Road, Flimby, Maryport, Cumbria, CA15 8RY.[23]

2.20 The directors of TAHL during the Relevant Period were [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂]and [✂].[24]

2.21 The current directors of TAHL are [✂], [✂], [✂], [✂], [✂], [✂] and [✂].[25]

C. The CMA's investigation

Criminal investigation

2.22 The CMA's investigation into suspected cartel conduct in relation to the supply of drawer wraps began in November 2011 as a criminal cartel investigation under section 192 of the Enterprise Act 2002 (EA02), following an email to the OFT cartels hotline.[26] This investigation was expanded to include drawer fronts in December 2011.

2.23 Following a thorough investigation, the CMA's criminal investigation was closed in September 2015. Having applied the Code for Crown Prosecutors,

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[19] TATL Annual Returns dated 29 March 2007, 29 March 2008 and 29 March 2009.
[20] TATL Annual Return dated 29 March 2016.
[21] TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, question 1 URN H0036. TATL Annual Returns dated 29 March 2007, 29 March 2008, 29 March 2009 and 29 March 2016.
[22] TAHL is the holding company for a group of companies based in the North of England engaged in building, contracting, allied trades, property development and mineral extraction, the manufacture of building materials and timber products and the distribution and sale of such products. TATL was the only company within the Thomas Armstrong corporate group supplying drawer wraps during the Relevant Period: see TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, questions 1 and 13 URN H0036.
[23] TAHL Annual Return dated 20 April 2016.
[24] TAHL Annual Returns dated 20 April 2007, 20 April 2008 and 20 April 2009. [✂]
[25] TAHL Annual Return dated 20 April 2016.
[26] Email from [✂] to the cartels hotline [✂] URN H0121.

the CMA decided not to instigate criminal proceedings under section 188 of the EA02 against any persons in respect of the conduct which was the subject of that investigation.

Civil investigation

2.24 The CMA's civil investigation under the Act was opened on 30 March 2016 and covered conduct in relation to:

(a) the supply of chipboard and MDF based drawer wraps by BHK and TATL; and

(b) the supply of chipboard and MDF based drawer fronts by TATL and Hoffman Thornwood Limited ('HTL').[27]

2.25 This Decision relates only to the civil investigation into an infringement of the Chapter I prohibition and/or Article 101 TFEU in relation to drawer wraps: the Infringement.

2.26 Material obtained during the criminal investigation and considered relevant to the civil investigation under the Act was placed on the civil case file. This includes documents seized pursuant to warrants issued under section 194 of the EA02, information and documents obtained under section 193 of the EA02, interview transcripts and witness statements.

2.27 During the course of the civil investigation, the CMA sent TATL and HTL notices requiring the production of documents and information under section 26 of the Act, and letters to BHK UK requesting documents and information without recourse to the CMA's formal powers.

2.28 The following paragraphs describe the nature of the evidence concerning the individuals who the CMA considers were the key participants in the Infringement.

BHK UK

[27] HTL is a limited liability company registered in England and Wales, with company number 01451361. It was incorporated on 28 September 1979. Its registered address is Clock House, Station Approach, Shepperton, Middlesex, TW17 8AN: HTL Annual Return dated 30 November 2015.

2.29 [✂][28] [✂] [29][✂][30]

2.30 [✂][31]

2.31 [✂]. [BHK UK senior employee 1's] account in interview was, in some respects, internally inconsistent and contradictory, and is not corroborated in certain key respects either by the evidence from other witnesses or the available documentary evidence.[32]

2.32 [✂][33] [✂] [34]

2.33 [✂].[35] Whilst [BHK UK employee 1] denied the cartel conduct in early interviews, [✂][36] [✂] his later evidence was largely consistent with, and corroborated by, that of [TATL senior employee 2] and the later evidence of [TATL senior employee 1].

TATL

2.34 [✂][37]

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[28] [✂]
[29] [✂]
[30] [✂]
[31] [✂]
[32] For example, in his first interview with the OFT, [BHK UK senior employee 1] states that he cannot remember having been at a meeting in Penrith in April 2006 with [BHK UK employee 1], [TATL senior employee 1] and [TATL senior employee 2] (see transcript of an interview with [BHK UK senior employee 1] on [✂] pages 33 and 37 to 38 URN 3006); but in a later interview, he no longer denies that such a meeting might have happened (see transcript of an interview with [BHK UK senior employee 1] on [✂], pages 17 and 73 URN 6297). Indeed, [BHK UK senior employee 1] recalls that he *'might have set up the meeting, because that was our first opportunity to talk as a company'* (transcript of an interview with [BHK UK senior employee 1] on [✂], page 134 URN 6297). By contrast, [BHK UK employee 1] clearly states that it was [BHK UK senior employee 1]'s idea to arrange – and that [BHK UK senior employee 1] took the lead at - the Penrith meeting (see witness statement of [BHK UK employee 1] dated [✂], paragraphs 16 to19 URN 12127). [TATL senior employee 1] also recalls [BHK UK senior employee 1] playing a significant role at that meeting (see for example transcript of an interview with [TATL senior employee 1] on [✂], point 29, page 17 URN 12371). On the basis of the clear and consistent evidence from the other witnesses at the Penrith meeting, the CMA is of the view that [BHK UK senior employee 1] attended this meeting and that his role was as described by those witnesses.
[33] [✂]
[34] [✂]
[35] [✂]
[36] [✂]
[37] [✂]

2.35 [✂]. Whilst [TATL senior employee 1] denied the cartel conduct [✂], he changed his stance in an interview on [✂].[38] This later evidence is largely consistent with, and corroborated by, the evidence of both [TATL senior employee 2] and the later evidence of [BHK UK employee 1].

2.36 [✂][39] [✂] [40] [✂] [41]

2.37 [✂][42] [TATL senior employee 2] has provided detailed witness statements about his knowledge of that suspected cartel.

BHK's leniency application

2.38 On 12 December 2011, BHK approached the OFT with an application for Type B leniency under the OFT's leniency policy (which has been adopted by the CMA). BHK was granted a provisional Type B marker on this date. This marker was confirmed by the CMA on 24 June 2016. The CMA signed a leniency agreement with BHK on 26 October 2016.

Settlement with TA

2.39 On 24 August 2016, TA expressed an interest in exploring settlement.

2.40 In accordance with the CMA's settlement policy, on 4 November 2016, the CMA provided TA with a draft Statement of Objections[43] together with access to the documents referred to in the draft Statement of Objections and a list of the documents on the CMA's file. On 11 November 2016, the CMA provided TA with a draft penalty calculation.

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[38] [TATL senior employee 1] initially denied talking about customers or prices at the meeting at Penrith in April 2006, maintaining that discussions at that meeting related to machinery and the demise of LMS (see, for example, transcript of an interview with [TATL senior employee 1] on [✂] pages 21 to 22 URN 3008). But in a later interview [TATL senior employee 1] stated that the discussions at the meeting in Penrith related to both machinery *and* an understanding as regards the passing on of the costs of raw materials (transcript of an interview with [TATL senior employee 1] on [✂], pages 13 to 16 URN 6054). [TATL senior employee 1] made wider admissions about the cartel conduct in later interviews (see in particular transcript of an interview with [TATL senior employee 1] on [✂] URN 12371).

[39] [✂]

[40] [✂]

[41] [✂]

[42] [✂]

[43] Under paragraph 14.13 of the CMA's guidance, *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8), a business in settlement discussions will be presented with a Summary Statement of Facts. In the present case, as a draft Statement of Objections was already in preparation, TA was provided with the draft Statement of Objections.

2.41 TA provided the CMA with its written representations on the draft Statement of Objections and the draft penalty calculation, and made oral representations on those documents in a settlement meeting held on 30 November 2016.

2.42 A copy of the draft Statement of Objections was provided to BHK at the same time as it was provided to TA. BHK made no representations on the draft Statement of Objections.

2.43 On 11 January 2017, TA:

(a) admitted that it had infringed the Chapter I prohibition and Article 101 TFEU (in the terms set out in a revised draft of the Statement of Objections dated 6 January 2017 that took account of TA's representations);

(b) agreed to accept a maximum penalty in the amount of the draft penalty calculation (as set out in a revised draft penalty calculation dated 6 January 2017 that took account of TA's representations); and

(c) agreed to cooperate in expediting the process for concluding the investigation.

2.44 On 19 January 2017, the CMA announced that it had settled the case with TA.

2.45 On 25 January 2017, the CMA issued a Statement of Objections to the Parties. The Parties made no representations on the Statement of Objections.

Decision in relation to drawer fronts

2.46 In addition to the Infringement, the CMA has found in a separate decision that TA was also involved in an infringement which had as its object the prevention, restriction or distortion of competition in relation to the supply of chipboard and MDF based drawer fronts to customers in the UK (the 'Drawer Front Infringement').

2.47 A decision concerning the Drawer Front Infringement is being issued at the same time as this Decision. The financial penalty that the CMA is imposing for TA's involvement in the Drawer Front Infringement has been taken into consideration in assessing the level of the penalty for TA's involvement in the Infringement (see paragraphs 6.40 to 6.42 below).

3. THE RELEVANT MARKET

A. Introduction

3.1 When applying the Chapter I prohibition and/or Article 101 TFEU, the CMA is obliged to define the relevant market only where it is not possible, without such a definition, to determine whether the agreement and/or concerted practice was liable to affect trade in the UK and/or between Member States, and whether it had as its object or effect the prevention, restriction or distortion of competition.[44]

3.2 No such obligation arises in this case because the Infringement involved an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition and was by its very nature liable to affect trade and competition in the UK and between Member States.

3.3 However, the CMA has formed a view of the relevant market in order to calculate the Parties' 'relevant turnover' in the market affected by the Infringement, for the purposes of establishing the level of any financial penalties that the CMA may decide to impose.[45] When assessing the relevant market for these purposes, it is not necessary to carry out a formal analysis: the relevant market may properly be assessed on a broad view of the particular trade affected by the infringement in question.[46]

3.4 The CMA is making a decision on the definition of the product and geographic market in this case for the sole purpose of determining the level of the applicable financial penalty. It does so without prejudice to the CMA's discretion to adopt a different market definition in any subsequent case in light of the relevant facts and circumstances in that case.

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[44] Case T-62/98 Volkswagen AG v European Commission [2000] ECR II-2707 ('*Volkswagen*'), par. 230 and Case T-29/92 SPO and Others v Commission [1995] ECR II-289 ('*SPO*'), par. 74.

[45] *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraphs 2.1 and 2.3 to 2.11.

[46] Argos and Littlewoods v OFT and JJB Sports v OFT [2006] ECWA Civ 1318, paragraphs 169 to 173 and 189 and the CAT judgment on penalty, Argos and Littlewoods v OFT [2005] CAT 13, at [176 to 178]. The CAT held that in Chapter I cases, determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement. It also held that is would be disproportionate to require the [OFT] to devote resources to a detailed market analysis, where the only issue is the penalty.

B. Relevant product market

3.5 The Infringement concerns the supply of chipboard and MDF based drawer wraps to the bedding, office and domestic furniture industry. As set out in paragraph 2.24 above, the CMA's civil investigation also concerned conduct by TATL and HTL in relation to the supply of chipboard and MDF based drawer fronts. The CMA has therefore focused its market definition analysis on the following questions:

(a) whether drawer fronts are in the same product market as drawer wraps; and

(b) whether the supply of drawer wraps is part of a wider market – the supply of timber based drawer components.

Are drawer fronts in the same market as drawer wraps?

3.6 From a demand side perspective, a drawer front is not a substitute for a drawer wrap, and nor are drawer wraps interchangeable with any other product. As noted in paragraph 2.6 above, the size and finish of any drawer wrap is determined by the customer's specific requirements, and those requirements vary from customer to customer.[47]

3.7 Witness evidence suggests that customers did, however, consider switching suppliers in response to an increase in price for drawer components (albeit that they might not have ultimately switched supplier).[48]

3.8 From a supply side perspective, the conditions of competition throughout the Relevant Period were different as between the supply of drawer wraps and the supply of drawer fronts. BHK UK and TATL manufactured drawer wraps for the bedding, domestic and office furniture industries.[49] The CMA understands that, as of early 2006, they were (and are) the only independent UK manufacturers.[50] TATL and HTL manufactured drawer fronts for the

[47] Transcript of an interview with [TATL senior employee 1] on [✂], page 15 URN 3008; transcript of an interview with [BHK UK senior employee 1] on [✂], pages 193 to 194 URN 6297.
[48] See for example, witness statement of [Silentnight employee 2] dated [✂], paragraphs 10 to 12 URN 11216.
[49] TATL's response dated 4 August 2016 to the CMA's section 26 notice dated 27 July 2016, question 1(a) URN H0149; BHK UK's response dated 1 September 2016 to the CMA's information request dated 27 July 2016, question 1 URN H0127; witness statement of [BHK UK employee 1] dated [✂], paragraph 3 URN 12127.
[50] See paragraph 2.7 of this Decision.

bedding furniture industry only,[51] and there were other manufacturers of drawer fronts who supplied the bedding and/or wider furniture industries.[52] Indeed, [TATL senior employee 1] has stated that the drawer front market was '*extremely competitive'* and that business was '*difficult to obtain'* given that there were numerous drawer front manufacturers in the UK.[53]

3.9 As regards the ability to switch from producing drawer fronts to drawer wraps in response to a relative increase in price, the CMA notes that (numerous) manufacturers of drawer fronts in the UK did not (and do not) also manufacture drawer wraps, suggesting that manufacturers cannot easily switch from manufacturing drawer fronts to drawer wraps.

3.10 Moreover, the CMA notes that until October 2014, TATL (an established drawer wrap manufacturer) had '*limited capacity*' and could make only mitred or single component, drawer wraps.[54] The fact that TATL, a supplier of drawer fronts, had such limited capabilities as regards the production of drawer wraps supports the argument that there may be significant additional costs in switching production from drawer fronts to drawer wraps.

3.11 The CMA also notes the witness evidence of [employee] of Ramsey Timber Ltd (a supplier of components for the divan bed industry), who has stated that,

'*I have researched the feasibility of producing drawer wraps and discovered that the set-up costs involved are horrendous. We would require an outlay in the region of £1 million in terms of capital expenditure, which includes the machinery to produce the drawer wraps. Also, it appears that it is a low margin business. I know this because I have been told the level of prices paid by customers. Also, every customer requires a different sized wrap so it is not possible just to supply one standard size.'*[55]

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[51] Transcript of an interview with [TATL senior employee 1] on [✂], page 12 URN 6062; TATL's response dated 4 August 2016 to the CMA's section 26 notice dated 27 July 2016, question 1(b) URN H0149; and HTL's response dated 22 August 2016 to the CMA's section 26 notice dated 27 July 2016, question 1 URN H0147.
[52] Transcript of an interview with [TATL senior employee 1] on [✂], pages 11 and 13 to 14 URN 6062; see also, for example: witness statement of [Customer 1 employee] dated [✂], paragraph 13 URN 10883; and witness statement of [Myers employee] dated [✂], paragraph 9 URN 10885.
[53] Transcript of an interview with [TATL senior employee 1] on [✂], pages 11, 17 to 18 and 20 URN 6062. See also witness statement of [Shaw Timber employee] dated [✂], paragraph 2 URN 11310.
[54] Witness statement of [DP Furniture employee] dated [✂], paragraph 4 URN 6299; TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, question 2 URN H0036, which explains that TATL did not begin to produce drawer wraps as piece parts until October 2014.
[55] Witness statement of [Ramsey Timber employee] dated [✂], paragraph 3 URN 11307.

3.12 For present purposes, therefore, the CMA is adopting a market definition in which drawer wraps and drawer fronts are in separate markets.

The supply of timber based drawer components

3.13 Throughout the Relevant Period, BHK UK and TATL manufactured and/or supplied other timber based drawer components such as drawer bases and drawer sides.[56] A further question therefore arises as to the extent to which the relevant product market should be defined more widely, to encompass these other products.

3.14 As in the case of drawer wraps, there is no demand-side substitutability for different timber based drawer components. As regards supply-side substitutability, the restrictions noted above may also apply to manufacturers of other timber based drawer components. For example, [BHK UK senior employee 2] has stated that, for BHK UK, the manufacture of bases has '*always been a sideline to the business'* and that the market for the manufacture of bases is, '*…a completely different structure, which has never really been competitive.'*[57]

3.15 This suggests that the supply of drawer wraps may not be part of a wider market. Taking a conservative approach, therefore, the CMA concludes, for the purpose of determining the level of any financial penalty in this case, that the relevant product market should not be defined so as to include other timber based drawer components.

Conclusions on the relevant product market

3.16 For the reasons set out above, the CMA is of the view that, for the purpose of determining the level of any financial penalty in this case, the relevant product market is the supply of chipboard and MDF based drawer wraps for supply to the bedding, domestic and office furniture industries.

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[56] BHK UK's response dated 20 May 2016 (as amended) to the CMA's information request dated 30 March 2016, question 2 URN H0105; TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, question 2 URN H0036.

[57] Transcript of an interview with [BHK UK senior employee 2] on [✂], pages 138 to 141 URN 10652.

C. Relevant geographic market

3.17 In determining the boundaries of the geographic market, the CMA has considered the demand and supply side constraints from both outside and within the UK.

Constraints from outside the UK

3.18 As set out below, whilst manufacturers/suppliers based outside the UK made sales of drawer wraps into the UK during the Relevant Period, in practice, such suppliers appear not to have exerted any significant competitive pressure on drawer wrap prices in the UK.

3.19 On the demand side, the evidence suggests that, although possible, it was relatively rare for customers to source drawer wraps from outside the UK[58] due to logistical difficulties and high transport costs.[59] Customers appear to have sourced products from non-UK suppliers only in limited, specific circumstances, for example, where they would benefit from fluctuations in currency rates.[60]

3.20 On the supply side, it has been suggested that for logistical reasons suppliers of drawer wraps based outside the UK would seek to supply customers in the UK only where a number of factors combined to make it advantageous for them to do so.[61]

3.21 As regards supply by UK companies to customers overseas, the CMA notes that whilst both BHK UK and TATL supplied customers in other parts of the EU, their turnover figures suggest that they did so to a relatively limited extent.[62]

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[58] Witness statement of [Dreams employee] dated [✂], paragraph 5 URN 10722; witness statement of [NPB employee 1] dated [✂], paragraph 6 URN 2987.
[59] Witness statement of [Customer 1 employee] dated [✂], paragraph 3 URN 10883; witness statement of [KD Products employee] dated [✂], paragraph 13 URN 12355; witness statement of [Myers employee] dated [✂], paragraph 4 URN 10885; witness statement of [Silentnight employee 2] dated [✂], paragraph 24 URN 11216; witness statement of [Silentnight employee 3] dated [✂], paragraph 46 URN 11215; BHK UK's response dated 20 May 2016 (as amended) to the CMA's information request dated 30 March 2016, question 3 URN H0105.
[60] Witness statement of [DP Furniture employee] dated [✂], paragraphs 4 and 7 URN 6299.
[61] For example where economies of scale in production and distribution mitigate the effect of transportation, sales and marketing, differential input costs and foreign exchange factors: see BHK UK's response dated 20 May 2016 (as amended) to the CMA's information request dated 30 March 2016, questions 3 and 7 URN H0105.
[62] TATL's response dated 4 August 2016 to the CMA's section 26 notice dated 27 July 2016, question 1 URN H0149; TATL's response dated 27 April 2016 to the CMA's section 26 request dated 30 March 2016, question 11

3.22 BHK UK has stated that because of the differences in the conditions of competition in wider geographic markets, BHK UK does not supply products to its German parent company on a regular basis as substitutes for products manufactured in Germany or Lithuania.[63]

3.23 Thus, adopting a conservative approach for the purposes of determining the relevant turnover of the Parties, the CMA takes the view that, for the purpose of determining the level of any financial penalty in this case, the geographic market for the supply of drawer wraps is no wider than the UK.

Constraints from inside the UK – regional segmentation

3.24 TATL has stated that it supplies drawer wraps throughout the UK;[64] and BHK UK has stated that it considers the market for the supply of drawer wraps to be the UK.[65]

3.25 The CMA further notes that the top 10 customer lists provided by TATL and BHK UK show that, during the Relevant Period, customers for drawer wraps were based across the whole of the UK, including Northern Ireland.[66]

3.26 There is no evidence to suggest that BHK UK or TATL sought to organise themselves along regional lines on the basis of, for example, haulage costs.

3.27 Thus, the CMA concludes that the geographic market in this case is not split along regional lines.

Conclusions on the relevant geographic market

3.28 For the reasons set out above, the CMA therefore finds that, for the purpose of determining the level of any financial penalty in this case, the relevant geographic market is the UK.

URN H0036; BHK UK's response dated 1 September 2016 to the CMA's information request dated 27 July 2016, question 1(a) URN H0127; BHK UK's response dated 20 May to the CMA's information request dated 30 March 2016, question 11 URN H0105.

[63] BHK UK's response dated 20 May 2016 (as amended) to the CMA's information request dated 30 March 2016, question 3 URN H0105.

[64] TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, question 3 URN H0036.

[65] BHK UK's response dated 20 May 2016 (as amended) to the CMA's information request dated 30 March 2016, question 3 URN H0105.

[66] TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, question 9 URN H0036; BHK UK's response dated 20 May 2016 (as amended) to the CMA's information request dated 30 March 2016, question 9 URN H0105.

D. Conclusions on the relevant market

3.29 For the reasons set out above, the CMA finds that, for the purpose of determining the level of any financial penalty in this case, the relevant market is the supply of chipboard and MDF based drawer wraps to the bedding, domestic and office furniture industries in the UK.

4. CONDUCT

A. Introduction

4.1 The CMA finds that between April 2006 and September 2008 BHK and TA infringed the Chapter I prohibition and/or Article 101 TFEU by participating in a single continuous infringement through an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of drawer wraps to customers in the UK.

4.2 This section sets out the evidence found by the CMA of contacts between BHK UK and TATL relating to the supply of drawer wraps during that period.

B. The origins of the drawer wraps arrangement – the Penrith meeting

4.3 The arrangement between BHK UK and TATL in relation to drawer wraps was put in place at a meeting on 10 April 2006 at the North Lakes Hotel, Penrith (the 'Penrith meeting').[67]

4.4 The Penrith meeting was attended by [BHK UK senior employee 1], [BHK UK employee 1], [TATL senior employee 1] and [TATL senior employee 2].[68]

4.5 [BHK UK employee 1] has explained that,

'[BHK UK senior employee 1] took the lead and was very straight to the point about what he wanted. He said to [TATL senior employee 1] that what they needed to do was for TAT[L] to have the bedding industry and for BHK [UK] to

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[67] Witness statement of [BHK UK employee 1] dated [✂], paragraphs 16 to 25 URN 12127; witness statement of [TATL senior employee 2] dated [✂], paragraphs 19 to 26 URN 2972; transcript of an interview with [TATL senior employee 1] on [✂], points 27 and 28, page 16 URN 12371.

[68] See, for example, witness statement of [BHK UK employee 1] dated [✂], paragraph 19 URN 12127; witness statement of [TATL senior employee 2] dated [✂], paragraph 3 URN 2971; witness statement of [TATL senior employee 2] dated [✂], paragraphs 19 to 21 URN 2972. [BHK UK employee 1] has suggested that there might have been a third individual from TATL at the Penrith meeting; see transcript of an interview with [BHK UK employee 1] dated [✂], pages 28 to 29 URN H0007; and witness statement of [BHK UK employee 1] dated [✂], paragraph 19 URN 12127. However, this is not consistent with the other witness evidence in relation to the Penrith meeting, and the CMA considers it unlikely that a third individual from TATL did attend this meeting. [TATL senior employee 2] refers to a '[✂]' in his early witness statements; but he later confirms that he got this name wrong, identifying [BHK UK senior employee 1] as the person to whom he was referring. See: witness statement of [TATL senior employee 2] dated [✂], paragraphs 2 and 3 URN 2973.

have the domestic and office furniture industry. [TATL senior employee 1] said words to the effect that that was a good idea….

…

…at the meeting the agreement was clearly defined as TAT[L] would have the major bedding customers and BHK [UK] would have the major domestic and office furniture customers.'[69]

4.6 Similarly, according to [TATL senior employee 1],

'At the meeting, [BHK UK senior employee 1] explained that he considered the best way to keep our heads above the water would be to service our own existing customers, i.e. to honour our obligations to them and to avoid the risk of coming under strain from attempting to purchase chipboard at grossly inflated prices from Europe to cater for expanded customer bases. *Given the adversity the industry was facing, I also felt that so long as the chipboard shortages remained and raw material prices continued to increase, it was in the interest of the industry and our respective customers for us to ensure stability by maintaining our existing customer bases.*

…

…[BHK senior employee 1]'s proposal therefore seemed sensible to me.'[70]

4.7 [TATL senior employee 1] added that he,

'…*left the North Lakes Hotel feeling fairly pleased, because in return for agreeing not to poach BHK [UK]'s customers, which we couldn't do anyway, we had reached an understanding with BHK [UK] that they would not seek to poach our customers'*.[71]

4.8 [TATL senior employee 2]'s description of the arrangement reached at the Penrith meeting is consistent with that of [BHK UK employee 1] and [TATL senior employee 1]. He explains:

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[69] Witness statement of [BHK UK employee 1] dated [✂], paragraphs 20 and 22 URN 12127.
[70] Transcript of an interview with [TATL senior employee 1] on [✂], points 29 and 30, page 17 URN 12371.
[71] See transcript of an interview with [TATL senior employee 1] on [✂], point 31, page 18 URN 12371.

'It was also proposed that each company would keep its own customers and if one of these customers tendered for a job that the incumbent company would keep the customer as the other company would put in an inflated tender.'[72]

4.9 [TATL senior employee 2] further recalls that [BHK UK senior employee 1] said that he '*wanted to protect the market from importers by agreeing price levels and to avoid a price war*';[73] but also that he '*didn't want prices to rise by so much that the market would became attractive to continental exporters.'*[74] When asked about this in interview, [BHK UK senior employee 1] stated that,

'*That's, again, his interpretation. My interpretation is that what we decided to do in terms of BHK [UK] was not get involved in taking business off Armstrong. That's it.*'[75]

4.10 Whilst [BHK senior employee 1]'s recollection of the Penrith meeting is vague,[76] his description of BHK UK's general relationship with TATL is consistent with the above descriptions of the arrangement reached at the Penrith meeting. [BHK UK senior employee 1] has explained that,

'*…the last thing we ever wanted to do with Thomas Armstrong was to fight them over customers because that would have been to nobody's advantage. It would either have lowered the price or we would have lost a customer. So we just didn't, what was theirs was theirs and what was ours was ours.* [77]

…

…we was leaving ourselves open, as I keep saying, to the foreign competition like Armanias and the Decruys who were big coming into the country. They were in the country but what we didn't want them doing was taking advantage of, of Armstrong and ourselves… [78]

…

…there was certainly no gentleman's agreement about price, prices or anything like that but I'm sure that there was an understanding…from an

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[72] Witness statement of [TATL senior employee 2] dated [✂], paragraph 4 URN 2971.
[73] Witness statement of [TATL senior employee 2] dated [✂], paragraph 4 URN 2971.
[74] Witness statement of [TATL senior employee 2] dated [✂], paragraph 22 URN 2972.
[75] Transcript of an interview with [BHK UK senior employee 1] on [✂], page 135 URN 6297.
[76] Transcript of an interview with [BHK UK senior employee 1] on [✂], page 17 URN 6297.
[77] Transcript of an interview with [BHK UK senior employee 1] on [✂], page 104 URN 6297.
[78] Transcript of an interview with [BHK UK senior employee 1] on [✂], page 105 URN 6297.

honesty and integrity perspective that we wouldn't deliberately go and target his customers and he, on the other hand, wouldn't target ours.'[79]

4.11 According to [BHK UK employee 1], participants at the Penrith meeting also discussed the particular customers that '*each company would back away from and not get involved with:*'[80]

(a) [TATL senior employee 1] specifically asked BHK UK to stay away from certain bedding furniture customers, namely, the Silentnight Group (comprising Silentnight Beds, Sealy Beds and Rest Assured), Horatio Myer in Huntingdon, Slumberland, Cumfilux in Birmingham, Sweet Dreams in Nelson and TATL's distributor in Halifax, Northern Paper Board ('NPB');[81]

(b) [BHK UK senior employee 1] agreed to this, asking TATL to keep away from some of BHK UK's most significant customers at that time, namely: Furniture Factory Ltd (including the brands Ready to Assemble, Sonnet and Austin Hinckley), MFI (part of Howdens), Homeworthy (part of Silentnight Group) and Kingstown Furniture.[82]

4.12 Witness evidence from [TATL senior employee 2] adds that, '*Prices were exchanged for a couple of customers at the meeting'*[83] and that, *'[BHK UK employee 1] mentioned the prices that BHK [UK] was charging a couple of its customers and [TATL senior employee 1] did the same for a couple of TAT*[L] *customers but he was still very wary.'*[84]

4.13 Whilst [TATL senior employee 1] has stated that he does not *'recall any specific prices being discussed, or specific percentage increases mooted,'* he does recollect that, *'[BHK UK senior employee 1] commented that BHK [UK] were going to raise their prices in order to recover some of the cost increases being imposed upon them. I stated we thought it may be necessary to increase our prices as the status quo was crippling the industry and was putting Armstrong's at risk.'* [85]

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[79] Transcript of an interview with [BHK UK senior employee 1] on [✂], page 108 URN 6297.
[80] Witness statement of [BHK UK employee 1] dated [✂], paragraph 20 URN 12127.
[81] Witness statement of [BHK UK employee 1] dated [✂], paragraph 20 URN 12127.
[82] Witness statement of [BHK UK employee 1] dated [✂], paragraph 21 URN 12127.
[83] Witness statement of [TATL senior employee 2] dated [✂], paragraph 4 URN 2971.
[84] Witness statement of [TATL senior employee 2] dated [✂], paragraph 22 URN 2972.
[85] Transcript of an interview with [TATL senior employee 1] on [✂], point 34, page 19 URN 12371.

4.14 [TATL senior employee 1] and [BHK UK employee 1] also recall a discussion of prices in respect of TATL's distributor NPB (see paragraph 4.24 below).

C. Follow-up to the Penrith meeting – email of 11 April 2006

4.15 On 11 April 2006, [BHK UK employee 1] sent an email to [TATL senior employee 1] stating,

'*Many thanks for your time and that of [TATL senior employee 2] at our meeting yesterday. I feel we gained a good understanding of how we can work together, mutual trust in any business is paramount.*'[86]

4.16 According to [BHK UK employee 1], [BHK UK senior employee 1] had asked him to send this email to '*tidy off*' some points that had arisen at the Penrith meeting;[87] and the reference to an '*understanding'* was '*a reference to the understanding that we would stay away from each others' customers*.'[88]

4.17 [TATL senior employee 1]'s interpretation of the email is consistent with this. He explains:

'The references in the email to 'a good understanding and mutual trust' must, however, refer to the consensus that customer bases would be maintained.'[89]

4.18 The email goes on to refer to the prices and arrangements described in paragraphs 4.19 to 4.27 below, which relate to certain of BHK UK's and TATL's customers and distributors, in particular: TATL's distributor, NPB; BHK UK's distributor, Al-Bilal, otherwise known as Ultimate Imports (hereafter, '*Ultimate'*); and the distributor Global Components (UK) Ltd ('*Global'*).

Supply to Global

4.19 First, the email states that BHK UK '*are not supplying nor do we intend to'* supply Global who, according to [BHK UK employee 1], had been a '*thorn in the side of Northern Paper Board.'*[90] The email goes on to say, '*hopefully your distributor will gain some additional business here.'* [BHK UK employee

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[86] URN 0040.
[87] Witness statement of [BHK UK employee 1] dated [✂], paragraph 26 URN 12127.
[88] Witness statement of [BHK UK employee 1] dated [✂], paragraph 27 URN 12127.
[89] Transcript of an interview with [TATL senior employee 1] on [✂], point 39, page 21 and the clarification at page 24 URN 12371.
[90] Witness statement of [BHK UK employee 1] dated 1 [✂], paragraph 27 URN 12127.

1] has clarified that the reference to '*your distributor'* is a reference to TATL's distributor, NPB.[91]

4.20 Witness evidence from [Global employee], is consistent with such an arrangement having been put into effect. Global had for a number of years been supplied with drawer wraps by LMS. [Global employee], recalls that when LMS went into administration in April 2006 he approached BHK UK for supply, and that [BHK UK employee 1] provided prices for Global to consider. However, when Global sought to place an order with BHK UK, [BHK UK employee 1]'s attitude changed: he refused to supply Global and did not provide an explanation. For a while, Global had to suspend its supply of drawer wraps because it could not obtain them.[92]

4.21 [Global employee] also approached TATL for prices for the supply of drawer wraps. However, he was informed that TATL would not supply Global because Global was in competition with TATL's distributor, NPB.[93]

4.22 Ultimately Global had to source the majority of its drawer wraps from outside the UK.[94] [Global employee] has stated that,

'*Looking back on it, I am now clear that BHK [UK]…and Armstrongs had some sort of agreement to set prices high and only supply certain companies. It appeared to me that Global was some kind of threat to them and we were potentially going to upset them and their agreements with distributors.*'[95]

Price indications

4.23 Next, the email refers to the pricing of a popular size of bedding drawer for Ultimate being '*not far away from your price indicated yesterday.'* The email further adds that,

'*Depending on what happens this week, I will push this price up to £1.06 which will give your man a chance…I am sure we can work together on this one to give all possible distributors a chance.'*

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[91] Witness statement of [BHK UK employee 1] dated [✂], paragraph 27 URN 12127.
[92] Witness statement of [Global employee] dated [✂], paragraph 3 URN 11311.
[93] Witness statement of [Global employee] dated [✂], paragraph 7 URN 11311.
[94] Witness statement of [Global employee] dated [✂], paragraph 12 URN 11311.
[95] Witness statement of [Global employee] dated [✂], paragraph 13 URN 11311.

4.24 [BHK UK employee 1] has stated that, at the Penrith meeting, [TATL senior employee 1] must have given him '*an indication of the prices that he was currently charging to Northern Paper Board and said that the prices we were charging to Ultimate Imports have got to be higher so that Northern Paper Board can compete with them*.'[96] In interview, [TATL senior employee 1] has stated that, *'I do recall saying something to [BHK UK employee 1] about Northern Paper Board complaining about low prices, but I had not in truth expected that he would do anything to benefit Northern Paper Board.'*[97]

4.25 Regardless of [TATL senior employee 1]'s expectations, [BHK UK employee 1] understood that, in effect, [TATL senior employee 1] was asking BHK UK to increase its prices to Ultimate.[98] It was with this in mind that [BHK UK employee 1] included the pricing information in the email; and as regards those prices [BHK UK employee 1] has stated that, *'indeed, I think I did push the prices up.* [99] [BHK UK employee 1] has also explained that the reference to giving '*all possible distributors a chance*' relates to Ultimate and Northern Paper Board being able '*to compete on a level playing field*'.[100]

4.26 Finally, in the email [BHK UK employee 1] asked [TATL senior employee 1] to provide him with pricing information for a specific drawer wrap:

'*I will be quoting during the course of today some of the large flat pack outlets on 100mm white a price indication would be appreciated.'*

4.27 [BHK UK employee 1] had been asked to provide quotes to several large flatpack furniture outlets (possibly Kingsdown, KD Products and [Customer 1]), and was looking to increase prices to those customers.[101] However, before doing so, he wanted to know TATL's prices to ensure that BHK UK would still win the business. [BHK UK employee 1] cannot remember whether [TATL senior employee 1] did in fact provide TATL's prices; however, he recalls that BHK UK did not lose any of that type of business to TATL at that time. [BHK UK employee 1], has stated that,

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[96] Witness statement of [BHK UK employee 1] dated [✂], paragraph 28 URN 12127.
[97] Transcript of an interview with [TATL senior employee 1] on [✂], point 41 page 22 URN 12371.
[98] Witness statement of [BHK UK employee 1] dated [✂], paragraph 28 URN 12127.
[99] Witness statement of [BHK UK employee 1] dated [✂], paragraph 28 URN 12127.
[100] Witness statement of [BHK UK employee 1] dated [✂], paragraph 28 URN 12127.
[101] Witness statement of [BHK UK employee 1] dated [✂], paragraph 29 URN 12127.

'*My asking [TATL senior employee 1] for his prices to furniture companies so that I can win the business was an example of the spirit of the agreement reached at Penrith.'*

Concluding remarks

4.28 The email ends by saying, '*…it was good to meet and talk, hopefully we can do this on a more regular basis.'*

4.29 According to [BHK UK employee 1], the next meeting took place when [TATL senior employee 1] and [TATL senior employee 2] visited BHK UK's factory; he recalls that *'[TATL senior employee 1] said words to the effect that what was discussed at Penrith was coming good which I took to mean that the agreement was being adhered to.'*[102]

D. The drawer wraps arrangement in action

Market sharing and bid rigging

4.30 Witness evidence from [BHK UK employee 1] describes how the arrangement reached at the Penrith meeting worked in practice.[103] When BHK UK was approached by a TATL customer (usually around the time of a price increase by TATL), [BHK UK employee 1] would inform [TATL senior employee 1] by telephone. It would then be agreed that BHK UK would either (a) quote high in order not to win the order, or (b) politely decline to quote at all. Whilst prices did not tend to be discussed in these calls, [BHK UK employee 1] '*generally knew from the customers what prices they were being quoted by TAT*' and there was a recognised higher level of pricing for bedding furniture companies. Thus, [BHK UK employee 1] knew the level at which he needed to quote so as to deliberately fail to secure the business.

4.31 According to [BHK UK employee 1], the arrangement extended to cover all – not just major - customers.[104] He has stated that not long after the Penrith meeting, he received from [TATL senior employee 1] a list of bedding furniture customers that TATL wished BHK UK to back away from. This list included the customers mentioned at the Penrith meeting as well as others.

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[102] Witness statement of [BHK UK employee 1] dated [✂], paragraph 30 URN 12127.
[103] Witness statement of [BHK UK employee 1] dated [✂], paragraph 32 URN 12127.
[104] Witness statement of [BHK UK employee 1] dated [✂], paragraphs 31 and 33 URN 12127.

4.32 [BHK UK employee 1] has also explained that he was instructed by [BHK UK senior employee 1] not actively to seek business from companies which were being supplied by TATL.[105] Moreover, on certain occasions when [BHK UK employee 1] attempted to secure business from smaller bedding furniture customers requesting quotes,[106] [BHK UK senior employee 1] told him that they were TATL customers and that he should '*back off and not go anywhere near them'*.[107]

4.33 In terms of specific examples, [BHK UK employee 1] recalls:

(a) either refusing to quote or quoting high for TATL's customers Silentnight Group, Horatio Myer and Cumfilux;[108]

(b) a request from [TATL senior employee 1] for BHK UK to '*back off*' from Slumber Dream and KD products in circumstances where they owed TATL or its distributor Northern Paper Board money;[109] and

(c) a request from [TATL senior employee 1] for BHK UK to keep away from RK Furniture.[110]

4.34 [BHK UK employee 1] also understood that TATL would similarly not actively attempt to secure business from BHK UK customers.[111] [BHK UK employee 1] specifically recalls that [TATL senior employee 1] backed off from Furniture Factory, one of BHK UK's major customers, as well as [Customer 1] (see below).[112]

4.35 In addition, in July 2007, [TATL senior employee 1] responded to an enquiry from West Sussex Office Furniture Ltd, declining to quote but suggesting that they contact [BHK UK employee 1] at BHK UK and providing his telephone number.[113] [TATL senior employee 1] has stated that TATL did not have the capacity to fulfil this order, and that he referred them to BHK UK out of

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[105] Witness statement of [BHK UK employee 1] dated [✂], paragraph 34 URN 12127.
[106] These customers included Sweet Dreams, Palatine Beds in Newcastle and Dreams in Birmingham.
[107] Witness statement of [BHK UK employee 1] dated [✂], paragraph 33 URN 12127.
[108] Witness statement of [BHK UK employee 1] dated [✂], paragraphs 32 and 57 URN 12127.
[109] Witness statement of [BHK UK employee 1] dated [✂], paragraphs 33 and 35 URN 12127.
[110] Witness statement of [BHK UK employee 1] dated [✂], paragraph 36 URN 12127.
[111] Witness statement of [BHK UK employee 1] dated [✂], paragraph 34 URN 12127.
[112] Witness statement of [BHK UK employee 1] dated [✂], paragraphs 38 to 42 URN 12127.
[113] URN 7396 and URN 3059.

courtesy.[114] However, the CMA notes that his approach was also consistent with an arrangement being in place between BHK UK and TATL.

Pricing

4.36 There is also evidence that the arrangement between BHK UK and TATL extended to discussions around pricing strategies.

4.37 [BHK UK employee 1] recalls that '*[TATL senior employee 1] and I did start to exchange information about price increases'*, having been instructed by [BHK UK senior employee 1] to '*develop and build on the understanding reached at Penrith.'*[115] According to [BHK UK employee 1], such pricing discussions generally followed an increase in the cost of raw materials, and included a discussion of the percentage increases that each hoped to achieve. [BHK UK employee 1] has stated that he and [TATL senior employee 1] would send each other drafts of the price increase letters that they would subsequently send to customers.

4.38 [BHK UK employee 1] further recalls that '*there were occasions when [BHK UK senior employee 1] told me that [TATL senior employee 1] was increasing his prices and that we therefore needed to increase our prices*'.[116] [BHK UK senior employee 1] would ask for BHK UK's percentage price increases to be higher than those of TATL, knowing that TATL would not be seeking to win BHK UK customers.

4.39 According to [BHK UK employee 1], there was a general arrangement that increases in the cost of raw materials would be passed on to customers, and that BHK UK and TATL would coordinate the announcement of price increases in this respect. He explains:

'*we discussed when the price increases should take place and then one of us would announce a price increase for drawer wraps and the other would announce its increase a short time later.'*[117]

4.40 Whilst [TATL senior employee 1] has denied that there was any collaboration on prices or percentage increases, his evidence is somewhat internally

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[114] Transcript of an interview with [TATL senior employee 1] on [✂], point 35, page 20 URN 12371.
[115] For example, letters such as the draft price increase letter dated May 2006 announcing a 10 per cent increase in the price of drawer wraps URN 4133; see witness statement of [BHK UK employee 1] dated [✂], paragraphs 66 and 69 URN 12127.
[116] Witness statement of [BHK UK employee 1] dated [✂], paragraph 67 URN 12127.
[117] Witness statement of [BHK UK employee 1] dated [✂], paragraph 65 URN 12127.

inconsistent in this respect. For example, he does accept that, at the Penrith meeting:

'*there was a general understanding that when raw material costs increased then we couldn't ignore those cost increases. We, in the past, if there was 2% or 3% increases in one or two costs we'd try and absorb those to help the customer as best we possibly could, but we were seeing sizeable increases that we'd never seen before in raw materials and so that was the understanding that we came to.'*[118]

4.41 Consistent with such an understanding being in place, a fax from [TATL senior employee 1] to [NPB employee 2], dated 5 June 2006 reads:

'Drawer wraps will increase by an across the board 9%. We will attempt to maintain the price levels for as long as possible but cannot rule out further increases during 2006.

As stated in our meeting, we fully expect our competitors to be doing likewise and believe you should not be inconvenienced in the market place.'[119]

4.42 Moreover, [TATL senior employee 1] has stated that:

'I was very open with Sonae in my email of 27 June 2007 about the fact that I had been discussing our prices with [BHK UK senior employee 1].'[120]

4.43 Sonae was one of TATL's suppliers of chipboard. In the email of 27 June 2007 [TATL senior employee 1] states:

'I feel I must write to you and echo the sentiments of [senior employee 1] at BHK [UK] who has supplied me with a copy of a letter sent to you this week…

…I don't think it is an exaggeration that continued price increases will result in the destruction of the UK furniture manufacturing industry and I would also, like [BHK UK senior employee 1], beg you to look again at your proposals for increases from July 2007 onwards.'[121]

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[118] Transcript of an interview with [TATL senior employee 1] on [✂], page 15 URN 6054.
[119] URN 5425; URN 6814.
[120] Transcript of an interview with [TATL senior employee 1] on [✂], point 21, pages 13 and 14 URN 12371.
[121] URN 3058.

4.44 A number of more detailed customer specific examples of the arrangement in action are set out below.

Silentnight

4.45 Silentnight was one of TATL's major customers.[122] At a quarterly TATL Board meeting on 13 June 2006, [TATL senior employee 1] produced a trading report for the period to May 2006 highlighting a proposed price increase to Silentnight in respect of drawer wraps:

'*Raw material costs have risen again by 4% and chipboard is in very short supply thus we have negotiated to bring in 25 loads from Spain in July.*

We have increased prices to all customers by approximately 9% from June 19th and will be increasing Silentnight Group at increased prices from August 1st.'[123]

4.46 In June 2006, [Silentnight employee 1] at Silentnight approached BHK UK and told [BHK UK employee 1] that '*TAT[L] was increasing his prices or that he was paying too much to them for drawer wraps.*'[124] [Silentnight employee 1] asked [BHK UK employee 1] to provide a quote from BHK UK, sending through a schedule of Silentnight's drawer wrap requirements.[125] According to [BHK UK employee 1], [Silentnight employee 1] was '*quite insistent'* that BHK UK quote and arranged a meeting at BHK UK to discuss the matter.[126]

4.47 [BHK UK employee 1] discussed Silentnight's request with [TATL senior employee 1] and it was agreed that they would make sure that BHK UK submitted a higher quote than TATL.[127] [BHK UK employee 1] also recalls speaking to [BHK UK senior employee 1], who said that it did not really matter what prices were quoted provided BHK UK did not go for the business.[128]

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[122] Witness statement of [BHK UK employee 1] dated [✂], paragraph 57 URN 12127.
[123] URN 0263.
[124] Witness statement of [BHK UK employee 1] dated [✂], paragraph 59 URN 12127.
[125] Witness statement of [BHK UK employee 1] dated [✂], paragraph 59 URN 12127; URN 0328.
[126] Witness statement of [BHK UK employee 1] dated [✂], paragraph 59 URN 12127.
[127] Witness statement of [BHK UK employee 1] dated [✂], paragraph 60 URN 12127. [BHK UK employee 1] believes that this discussion took place before the meeting with [Silentnight employee 1].
[128] Witness statement of [BHK UK employee 1] dated [✂], paragraph 60 URN 12127.

4.48 At a meeting with [Silentnight employee 1] on 8 June, [BHK UK employee 1] agreed to look at Silentnight's requirements, but no prices were discussed.[129]

4.49 At 09:19 on 9 June 2006, [BHK UK employee 1] faxed Silentnight's schedule of requirements to [TATL senior employee 1].[130] At 11:19 on 9 June 2006, [TATL senior employee 1] sent a fax to [BHK UK employee 1] stating:

'*Further to receipt of your fax comment as follows*

Monthly usage <u>well</u> overestimated.

Suggest price levels to go in at as follows

…'.[131]

4.50 The fax then provides suggested prices for various specifications of drawer wrap for Silentnight, Sealy, Pocket Spring and Rest Assured. In interview, [BHK UK employee 1] stated that the fax was '*basically just fixing the price that we would quote Silentnight to make sure we were higher than TAT'*.[132]

4.51 For reasons he can no longer remember, [BHK UK employee 1] did not use the pricing proposals that [TATL senior employee 1] sent to him on 9 June 2006.[133] Instead, on 4 July 2006 [BHK UK employee 1] sent a letter to [Silentnight employee 1] explaining that, due to a shortage of chipboard and current levels of demand, BHK UK were unable to provide a quote.[134] The letter reads:

'*With the influx of orders because of the demise of LMS this has put a tremendous strain on our manufacturing resources and capabilities. We are having extreme difficulty in obtaining chipboard…*

I am sorry, for the moment [Silentnight employee 1], all our group facilities are stretched and presently unable to quote for the Silentnight Bedding business.'

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[129] Witness statement of [BHK UK employee 1] dated [✂], paragraph 61 URN 12127.
[130] URN 0124, which is a fax copy of URN 0328, addressed to '[TATL senior employee 1]' from '[BHK UK employee 1]. The CMA notes that URN 0124 contains [TATL senior employee 1]'s handwritten comments, stating '*Monthly usage <u>well</u> overestimated! Have indicated price levels to go in at…'.*
[131] URN 0123 (the original, recovered from TATL's premises) and URN 0327 (the faxed copy, recovered from BHK UK's premises).
[132] Witness statement of [BHK UK employee 1] dated [✂], paragraph 62 URN 12127.
[133] Witness statement of [BHK UK employee 1] dated [✂], paragraph 62 URN 12127.
[134] URN 2826.

4.52 [BHK UK employee 1] has explained that the important point was not the *way* in which he declined Silentnight's business, but simply that '*the instruction from [BHK UK senior employee 1] at this time was that Silentnight was a TAT[L] customer and it was a no-go customer for BHK [UK]'*. [BHK UK employee 1] notes that '*the contents of the letter are not accurate because we could have taken on Silentnight business if we had wanted to.'*[135]

4.53 In interview, [TATL senior employee 1] provided a different explanation as regards the background to these events.[136] He stated that [BHK UK employee 1] told him that BHK UK was not able to supply Silentnight because (i) BHK UK was unable to obtain appropriate insurance to cover any potential losses which would arise in the event of Silentnight being unable to pay, and (ii) BHK UK did not have the capacity or the resources to take on the Silentnight work at that time. According to [TATL senior employee 1], BHK UK did not want to risk souring its relationship with Silentnight by refusing to quote, so [BHK UK employee 1] asked for TATL's prices so that he could quote higher. [TATL senior employee 1] has stated that, '*I didn't think that was in any way wrong, so I agreed.'*[137]

4.54 This explanation of events is consistent with [BHK UK employee 1]'s letter to [Silentnight employee 1] of 4 July, but inconsistent with [BHK UK employee 1]'s witness evidence that BHK UK '*could have taken on the Silentnight business if we had wanted to.'*[138]

4.55 In any event, neither [BHK UK employee 1] nor [TATL senior employee 1] disputes that pricing information was shared so that a tactical (high) price could be submitted by BHK UK, thereby allowing TATL to retain Silentnight's business.

4.56 The CMA also notes that [Silentnight employee 1] has stated that '*I do recall receiving this letter as it was not normal for suppliers to turn down the opportunity to quote.'*[139]

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[135] Witness statement of [BHK UK employee 1] dated [✂], paragraph 62 URN 12127.
[136] Transcript of an interview with [TATL senior employee 1] on [✂], point 36, page 20 URN 12371.
[137] Transcript of an interview with [TATL senior employee 1] on [✂], point 36, page 20 URN 12371.
[138] Witness statement of [BHK UK employee 1] dated [✂], paragraph 62 URN 12127.
[139] Witness statement of [Silentnight employee 1] dated [✂], paragraph 28 URN 6321.

4.57 On 11 July 2006, [TATL senior employee 1] faxed his quotes to [Silentnight employee 1].[140] [TATL senior employee 1]'s trading report for September 2006 said, in respect of drawer wraps:

'*We have continued to work flat out in this department with a full order book and a waiting list for customers.*

…

Price increases ranging between 9 and 12% have been accepted by all our customers and we shall be looking to go for more increase later in the year.'[141]

4.58 There is further evidence of contact between BHK UK and TATL in relation to pricing for Silentnight in 2008. The CMA has obtained a copy of an email sent by [TATL senior employee 2] to Silentnight in February 2008, which appears to include [TATL senior employee 1]'s handwritten notes setting out BHK UK's pricing.[142]

[Customer 1]

4.59 [Customer 1] was a BHK UK customer which produced self-assembly flatpack lounge and bedroom furniture for retailers such as Argos, Asda and Sainsbury's.[143]

4.60 According to [BHK UK employee 1], this customer came up in discussions with [TATL senior employee 1] on a number of occasions.[144] One example, typical of such contact, arose not long after the Penrith meeting when [TATL senior employee 1] called [BHK UK employee 1] to ask if BHK UK was dealing with [Customer 1]. [BHK UK employee 1] confirmed that it was, and that TATL '*should not go near them*'. [BHK UK employee 1] has stated that, '*I believe he must have backed off because we retained the business at that time.'*

4.61 Witness evidence from [Customer 1 employee], is consistent with such an arrangement having been in place. [Customer 1 employee] recalls that on

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[140] URN 0121.
[141] URN 0264.
[142] URN 0090 and URN 0091. See witness statement of [TATL senior employee 2] dated [✂], paragraph 37 URN 10347.
[143] Witness statement of [Customer 1 employee] dated [✂], paragraph 2 URN 10883.
[144] Witness statement of [BHK UK employee 1] dated [✂], paragraph 39 URN 12127.

one occasion he approached TATL and asked it to supply drawer wraps, but that [TATL senior employee 1] was reluctant to do so because he was concerned that BHK UK might subsequently attack TATL's customer base. [Customer 1 employee] recalls that [TATL senior employee 1] refused to provide a quote on that occasion.[145]

4.62 Another example of contact between BHK UK and TATL in relation to [Customer 1] arose in late 2007 and early 2008. On 27 November 2007, [Customer 1 employee] sent an email to [TATL senior employee 1] attaching [Customer 1]'s weekly drawer wrap requirements, stating:

'*Please find attached the information that we discussed earlier*.

If you feel only some of the business would be of interest then I am happy to discuss the range at line level.'[146]

4.63 On 2 January 2008, [Customer 1 employee] sent the email to [TATL senior employee 1] again, asking '*could you please advise of the situation regards this enquiry*.'

4.64 On 16 January 2008, [TATL senior employee 1] sent an email to [Customer 1 employee] stating,

'*I have had some time now to think about our discussions and am keen to look for a way forward but am concerned as to how our competitor will react should you decide to take us on board with you. We are very aware that they are looking for additional work and feel sure that they will react aggressively…*

The preferred way forward would be for yourselves to relinquish ties with BHK [UK] indicating that you are going to source all wraps fro [sic] Decruy. This way forward may prevent them from immediately targeting our customers and forcing us to respond with price adjustments.'[147]

4.65 The CMA infers from this that an arrangement was in place between TATL and BHK UK, but that on this occasion [TATL senior employee 1] was seeking to circumvent that arrangement without BHK UK finding out. This interpretation is consistent with [TATL senior employee 1]'s interview evidence, in which he explains:

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[145] Witness statement of [Customer 1 employee] dated [✂], paragraph 5 URN 10883.
[146] URN 8396.
[147] URN 5271.

'*I decided that this was a tender that I did in fact want to win for us. However, I did not want BHK [UK] to know that I was trying to win their customer, and on the contrary, wanted them to think that I was deliberately not wanting to win their customer. Therefore, when I submitted the tender, I sought to undercut BHK [UK]. I also asked [Customer 1], if they did decide to go with us, to tell BHK [UK] that they were going to Decruy, so that BHK [UK] did not think that we were trying to poach their customers, and therefore start a turf war.'*[148]

4.66 However, the CMA believes that by the time that the quotes were actually submitted, BHK UK and TATL had reached an agreement that TATL would not seek to win this tender, noting that BHK UK submitted a lower quote than TATL, thereby retaining [Customer 1]'s business.[149] This view is supported by an internal BHK UK email dated 2 February 2008, in which [BHK UK senior employee 1] asked [BHK UK employee 8] to liaise with [TATL senior employee 1] in relation to the supply of some foil, adding:

'*I want to do him this favour as he has recently done one for us by keeping away from [Customer 1] or rather when he was asked to quote by them he lifted his price above ours and therefore keeping us in the race for their business now we have increased our credit insurance on them.'*[150]

4.67 The CMA also notes [BHK UK employee 1]'s witness evidence, which summarises his general understanding of the situation in relation to [Customer 1] as follows,

'…*as a result of the agreement with TAT[L], I knew that [Customer 1] were one of BHK [UK]'s customers and that TAT[L] would not be quoting to win that business.'*[151]

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[148] Transcript of an interview with [TATL senior employee 1] on [✂], point 44, page 25 URN 12371.
[149] Witness statement of [Customer 1 employee] dated [✂], paragraph 9 URN 10883.
[150] URN 7566. BHK UK did supply TATL with some PVC foil. On 5 February 2008 BHK UK invoiced TATL for £1,243.04 in respect of the sale of PVC foil: URN 2747; and see also witness statement of [BHK UK senior employee 3] dated [✂], paragraph 5 URN 12245.
[151] Witness statement of [BHK UK employee 1] dated [✂], paragraph 42 URN 12127.

Hilding Anders (Slumberland)

4.68 Hilding Anders is a Swedish company that manufactures beds in the UK under two main brands: Slumberland and Dunlopillo. It purchased drawer wraps from BHK UK and TATL.[152]

4.69 During an OFT inspection, a price increase letter from BHK UK to Hilding Anders UK dated 19 May 2006, together with a quote to Slumberland also dated 19 May 2006 and an extract from BHK UK's 'Semiramis' sales system,[153] was found at the premises of TATL. These documents would have provided TATL with a clear indication of the prices that BHK UK were charging to Slumberland.

4.70 Whilst it is not clear how and by whom these documents were provided to TATL, the CMA notes that it would have been consistent with the Penrith arrangement for this information to have been disclosed to TATL by BHK UK. The CMA further notes that witness evidence from [Hilding Anders employee], states that,

'I did not provide this document to Thomas Armstrong Timber. I would never provide one supplier with documents provided by another supplier giving details of exact quotes and prices. As a customer, we would try and play suppliers off against each other to get the best price and this would be difficult if we gave out such exact pricing information. I do not know if [Slumberland employee] provided the document to Thomas Armstrong Timber.'[154]

[Slumberland employee] [✂] has stated that he does not recognise the documents in question.[155]

Internal minutes and reports

4.71 A number of internal trading reports and meeting minutes refer to the relationship between BHK UK and TATL, providing evidence of an arrangement to divide the market through the allocation of customers and maintain customer bases.

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[152] Witness statement of [Hilding Anders employee] dated [✂], paragraphs 2 and 5 URN 10886.
[153] URN 5503.
[154] Witness statement of [Hilding Anders employee] dated [✂], paragraph 13 URN 10886.
[155] Witness statement of [Slumberland employee] dated [✂], paragraphs 1 and 9 URN 11208.

TATL

4.72 In TATL's trading report for December 2006, [TATL senior employee 1] records:

'*A very good set of results, showing record sales and record profits. It's only taken 13 years to get there!!*

All this is due to the demise of LMS and our new found relationship with B.H.K.'[156]

4.73 In TATL's trading report dated August 2008, [TATL senior employee 1] writes:

'*We have identified that BHK [UK] are approaching some of our customers. The writer has a meeting with [BHK senior employee 1] on Monday 15th in order to make it clear that we will approach their customers unless they stop immediately.'*[157]

4.74 [TATL senior employee 1] has explained that,

'I was referring here to a very loose understanding, almost as I put it at the time, more of a threat and counter-threat here that if BHK [UK] tried to poach our customers we would seek to poach theirs.'[158]

4.75 In TATL's trading report headed 'May to August 2008,' but which has a footer stating '*Timber Trading Report – August to November 2008*,' [TATL senior employee 1] records:

'*Various rumours are circulating with regard to our competitor BHK [UK]. We are aware that they have announced price increases from December 1st and they have obviously upset a few customers as a result of this. The writer is attempting to gain some business from them by using distributors so that we cannot be accused of going direct.'*[159]

4.76 [TATL senior employee 1] has stated that he was trying to take business from BHK UK by using distributors *'so as not to cause a turf war at a precarious time. To say that we were not in competition is just not right.'*[160] However, the CMA considers that, when considered in the light of the witness and

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[156] URN 0265.
[157] URN 0258.
[158] Transcript of an interview with [TATL senior employee 1] on [✂], point 21(d), page 13 URN 12371.
[159] URN 0038.
[160] Transcript of an interview with [TATL senior employee 1] on [✂], point 48, page 26 URN 12371.

documentary evidence set out above, this trading report supports the CMA's finding that an arrangement was in place, albeit that [TATL senior employee 1] did not wish BHK UK to know that he was trying to circumvent that arrangement at this time.

4.77 The minutes of the Board Meeting of TAHL in March 2009 record that [TATL senior employee 1] told the meeting that TATL '*has a strong customer base due to the agreement made with BHK [UK].*'[161]

BHK UK

4.78 In BHK UK's Monthly Management Report dated December 2007, [BHK UK employee 1] writes that:

'*Both [BHK UK senior employee 1] and I have discussed the bedding industry at some considerable length during December and the agreed outcome is that the only way BHK UK are to increase our drawer market business is to take Armstrong's on head to head, our first large bedding enquiry for Silentnight has been quoted and await the results during January.'*[162]

4.79 In the BHK UK budget for 2008, the following was recorded under the heading 'drawers':

'There is potentially more business out there but it would mean taking on Armstrongs, who have thus far been a strong ally to BHK [UK].'[163]

4.80 The CMA is of the view that, when considered in the light of the witness and documentary evidence set out above, these internal BHK UK documents support the CMA's finding that an arrangement was in place between BHK UK and TATL, albeit that the arrangement was sometimes under strain.

Other witness evidence

4.81 The CMA also notes that a number of witnesses from within BHK UK have stated that they considered that there was something unusual about the relationship between BHK UK and TATL. For example, [BHK UK employee 6] has stated that,

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[161] URN 1943.
[162] URN 3373.
[163] URN 3617.

'…the impression I got from discussions at production meetings was that TAT[L] had got their own customers and BHK [UK] had got their own customers. It appeared to me that BHK [UK] wanted to leave TAT[L]'s business alone and that we were not interested in TAT[L]'s customers.'[164]

E. The deterioration of the drawer wraps arrangement

4.82 According to [BHK UK employee 1], the arrangement between BHK UK and TATL began to break down when the furniture industry went into decline in 2007 and 2008, and that [✂] in September 2008, the arrangement with TATL was '*well and truly over as far as I was concerned'*.[165]

4.83 The CMA has found little evidence[166] to suggest that the arrangement continued past September 2008. Given the scarcity and quality of the evidence after this date, the CMA is not extending the duration of its finding of infringement past September 2008.

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[164] Witness statement of [BHK UK employee 6] dated [✂], paragraph 7 URN 3264. See also, witness statements of [BHK UK employee 2] dated [✂], paragraph 4 URN 3262; [BHK UK employee 4] dated [✂], paragraph 24 URN 3266; [BHK UK employee 5], [✂], paragraphs 16-19 URN 3261; [BHK UK employee 7], [✂], paragraph 11 URN 3263; [BHK UK employee 9], [✂], paragraphs 7 to 10 URN 3265.

[165] Witness statement of [BHK UK employee 1] dated [✂], paragraphs 44 to 51 URN 12127.

[166] [TATL senior employee 2] has stated that comments made by [TATL senior employee 1] in conversation led him to believe that the arrangement in relation to drawer wraps was in place up to the time that [✂] (witness statement of [TATL senior employee 2] dated [✂], paragraph 5 URN 2971). By way of example, [TATL senior employee 2] has stated that he was aware that BHK UK was in telephone contact with TATL in late 2009 or early 2010, citing an occasion on which [employee 1, BHK UK] phoned and ask to speak to [TATL senior employee 1]; however, [TATL senior employee 2] does not know what was discussed during that telephone call (witness statement of [TATL senior employee 2] dated [✂], paragraph 29 URN 2972). The CMA has found a very small amount of documentary evidence, which might be indicative of an agreement being in place during 2011. In August 2011, [TATL senior employee 1] sent an email to [Customer 2] saying '*should BHK [UK] ask, can you please advise that you are sourcing from Decruy in Belgium or Spain as you indicated'* URN 3062 and URN 7326; however, it is not entirely clear whether this statement relates to drawer wraps, fronts and/or bases. There is also evidence of an email from [BHK UK employee 3] to [TATL senior employee 1] dated 18 July 2011 URN 8173, which states *'please review your 4% price increase, you are just too kind [TATL senior employee 1].'* [TATL senior employee 1] has stated that the prices in question were not confidential and had already been indicated to TATL's current customers, and both [BHK UK employee 3] and [TATL senior employee 1] have stated that this comment was meant sarcastically and as a joke (see transcript of an interview with [TATL senior employee 1] on [✂], point 60, page 30 URN 12371; transcript of an interview with [BHK UK employee 3] on [✂], pages 63 to 74 URN 3007; transcript of an interview with [BHK UK employee 3] on [✂], pages 39 and 40 URN 12928).

5. LEGAL ASSESSMENT

A. Introduction

5.1 This section sets out the CMA's legal assessment of the conduct set out in Section 4, in light of the factual background set out in Sections 2 and 3. The key legal principles, including references to the relevant case law and primary and secondary legislation, are also included in this section.

5.2 The CMA has assessed the evidence in this case by reference to the civil standard of proof, namely whether it is sufficient to establish on the balance of probabilities that an infringement occurred.[167]

B. General

5.3 For present purposes, the CMA's findings are made by reference to the following provisions of the UK and EU competition rules:

(a) the Chapter I prohibition[168] prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK. This prohibition applies unless an applicable exclusion is satisfied or the agreements in question are exempt in accordance with the provisions of the Act. References to the UK are to the whole or part of the UK;[169]

(b) Article 101 TFEU prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the EU, unless they are exempt in accordance with Article 101(3) TFEU.

5.4 For the reasons set out below, the CMA's finding is that BHK and TA have infringed the Chapter I prohibition and/or Article 101 TFEU. [170]

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[167] *Tesco Stores Limited v Office of Fair Trading* [2012] CAT 31, at [88].

[168] Section 2 of the Act

[169] Section 2(1) and (7) of the Act.

[170] Both provisions are relevant to this case by reason of Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (the 'Modernisation Regulation').

5.5 When applying the Chapter I prohibition to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 101 TFEU which may affect trade between Member States within the meaning of that provision, the CMA must also apply Article 101 TFEU to such agreements, decisions or concerted practices. [171]

C. Undertakings

Legal principles

5.6 For the purposes of the Chapter I prohibition and Article 101 TFEU, the term 'undertaking' covers *'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'*.[172]

5.7 An entity is engaged in *'economic activity*' where it conducts any activity *'of an industrial or commercial nature by offering goods and services on the market'.*[173]

5.8 The term 'undertaking' also designates an economic unit, even if in law that unit consists of several natural or legal persons.[174]

Application to the Infringement

5.9 During the Relevant Period, BHK UK and TATL were engaged in an economic activity, namely the supply of timber based components, including drawer wraps.

5.10 The CMA therefore concludes that BHK UK and TATL constitute undertakings for the purposes of the Chapter I prohibition and Article 101 TFEU. As discussed in paragraphs 5.76 to 5.85, BHK KG and TAHL are considered to

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[171] Article 3(1) of the Modernisation Regulation. In addition, section 60 of the Act provides that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to UK competition law should be dealt with in a manner which is consistent with the treatment of corresponding questions under EU competition law. Further, the CMA (i) must act (so far as it is compatible with the provisions of Part I of the Act) with a view to securing that there is no inconsistency with the principles laid down by the TFEU, the Court of Justice (the '*Court of Justice'*) and the General Court (the '**GC**') (together, the 'European Courts') and any relevant decision of the European Courts; and (ii) must have regard to any relevant decision or statement of the European Commission.

[172] Judgment of 23 April 1991, *Klaus Höfner and Fritz Elser v Macrotron GmbH*, C-41/90, EU:C:1991:161, paragraph 21.

[173] Judgment of 16 June 1987, *Commission v Italian Republic*, C-118/85, EU:C:1987:283, paragraph 7.

[174] Judgment of 10 September 2009, *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 55.

form part of the same undertaking as, and to be jointly and severally liable for the conduct of, their respective subsidiaries.

D. Agreements between undertakings and concerted practices

Legal principles

5.11 The Chapter I prohibition and Article 101 TFEU apply to agreements between undertakings and concerted practices.[175]

5.12 It is not necessary, for the purpose of finding an infringement, to distinguish between agreements and concerted practices, or to characterise conduct as exclusively an agreement, a concerted practice or a decision by an association of undertakings.[176] Nothing turns on the precise form taken by each of the elements comprising the overall agreement and/or concerted practice. As explained by the Court of Justice, '*it is settled case-law that, although Article [101 TFEU] distinguishes between 'concerted practice', 'agreements between undertakings' and 'decisions by associations of undertakings', the aim is to have the prohibition of that article catch different forms of coordination between undertakings of their conduct on the market* […] *and thus to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct'.*[177]

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[175] Section 2(1) of the Act and Article 101(1) of the TFEU.

[176] *Argos, Littlewoods and JJB*, at [21]. See also Judgment of 17 December 1991, *Hercules Chemicals v Commission* T-7/89, EU:T:1991:75, paragraph 264; Judgment of 24 October 1991, *Rhône-Poulenc v Commission* T-1/89, EU:T:1991:56, paragraph 127; Judgment of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92 P, EU:C:1999:356, paragraphs 131 and 132; and also *Roofing Felt*, in which the conduct of the undertakings was found to be an agreement as well as a decision of an association.

[177] Judgment of 11 September 2014, *MasterCard and Others v Commission* C-382/12 P, EU:C:2014:2201; *Judgment in MasterCard and Others v Commission, EU:C:2014:2201*, paragraph 63 and the case law cited. See Judgment of 20 March 2002, *HFB and Others v Commission* T-9/99, EU:T:2002:70, paragraphs 186 to 188; Judgment of 23 November 2006, *ASNEF-EQUIFAX C-238/05*, EU:C:2006:734, paragraph 32. See also *Judgment of 20 April 1999, LVM v Commission, joined cases T-305/94, T-306/94, etc., EU:T:1999:80*, paragraph 696: '*In the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [101] of the Treaty*.'

Agreements

5.13 The Chapter I prohibition and Article 101 TFEU are intended to catch a wide range of agreements, including oral agreements and *'gentlemen's agreements*'.[178] An agreement may be express or implied by the parties, and there is no requirement for it to be formal or legally binding, nor for it to contain any enforcement mechanisms.[179] An agreement may consist of either an isolated act or a series of acts or a course of conduct.[180] The key question is whether there has been '*a concurrence of wills between at least two parties, the form in which it is manifested being unimportant, so long as it constitutes the faithful expression of the parties' intention'*.[181]

5.14 Although it is necessary to show the existence of a joint intention to act on the market in a specific way in accordance with the terms of the agreement, the CMA is not required to establish a joint intention to pursue an anti-competitive aim.[182]

Concerted practices

5.15 The concepts of '*agreements'* and '*concerted practices*' are intended to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves.[183]

5.16 The Court of Appeal has noted that *'concerted practices can take many different forms, and the courts have always been careful not to define or limit what may amount to a concerted practice for [the] purpose'* of determining

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[178] Judgment of 15 July 1970, *ACF Chemiefarma v Commission* C-41/69, EU:C:1970:71, paragraphs 106 to 114.
[179] *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at [658]; Commission Decision of 9 December 1998, *Greek Ferries*, Case IV/34466, paragraph 141 (upheld on appeal).
[180] Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 81.
[181] Judgment of 26 October 2000, *Bayer v Commission* T-41/96, EU:T:2000:242, paragraph 69 (upheld on appeal in Judgment of 6 January 2004, *BAI and Commission v Bayer*, joined cases C-2/01 P and C-3/01 P, EU:C:2004:2, paragraphs 96 and 97) and Judgment in *Hercules Chemicals v Commission*, EU:T:1991:75, paragraph 256.
[182] Judgment of 27 September 2006, *GlaxoSmithKline Services Unlimited v Commission*, T-168/01, EU:T:2006:265, paragraph 77 (upheld on appeal in Judgment of 6 October 2009, *GlaxoSmithKline Services Unlimited v Commission*, Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610).
[183] Judgment of 4 June 2009, *T-Mobile Netherlands and Others* C-8/08, EU:C:2009:343, paragraph 23; see also Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 131 and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, [206(ii)].

whether there is consensus between the undertakings said to be party to a concerted practice.[184]

5.17 For present purposes, the following key points arise from the case law on the concept of a concerted practice:

(a) the concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market, including the choice of the persons and undertakings to which it makes offers or sells;[185]

(b) a concerted practice is, '*a form of coordination between undertakings which without having reached the stage where an agreement properly so-called has been concluded*, *knowingly substitutes practical cooperation between them for the risks of competition.'* [186] The Court of Justice has added that: '*By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants;'*[187]

(c) the coordination comprises '*any direct or indirect contact*' between undertakings which has the object or effect of influencing the conduct on the market of an actual or potential competitor[188] thereby creating conditions of competition which do not correspond to the normal conditions of the market in question;[189]

(d) it follows that '*a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two*'.

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[184] *Argos, Littlewoods and JJB*, at [22].

[185] Judgment of 16 December 1975, *Suiker Unie and Others v Commission* C-40/73, EU:C:1975:174, paragraph 173. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(iv)].

[186] Judgment of 14 July 1972, *ICI v Commission* C-48/69, EU:C:1972:70, paragraph 64. See also Judgment in *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 26 and *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at [151] to [153].

[187] Judgment in *ICI v Commission*, EU:C:1972:70, paragraph 65. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at [151].

[188] Judgment in *Suiker Unie and Others v Commission*, EU:C:1972:70, paragraph 174. See also Judgment in *T-Mobile Netherlands and Others*, EU:C:2009:343, at paragraph 33; and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(v)]. The case law provides that a concerted practice also arises in the situation in which the object or effect of the direct or indirect contact is to disclose to a competitor the course of conduct which the disclosing party has decided to adopt or contemplates adopting on the market.

[189] Judgment of 14 July 1981, *Züchner v Bayerische Vereinsbank* C-172/80, EU:C:1981:178, paragraph 14; Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 117; and Judgment in *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 33.

However, that does not necessarily mean that the conduct should produce the concrete effect of restricting, preventing or distorting competition. [190]

Application to the Infringement

5.18 On the basis of the facts and evidence set out above, the CMA finds that there was a concurrence of wills between BHK UK and TATL (for the purposes of the Chapter I prohibition and Article 101 TFEU) sufficient to amount to an agreement and/or a concerted practice in relation to the supply of drawer wraps to customers in the UK.

5.19 The evidence shows that a '*clearly defined*' arrangement was put in place at the Penrith meeting.[191] At that meeting, BHK UK and TATL agreed not to compete with each other, and to divide the market for the supply of drawer wraps through the allocation of customers. In pursuit of this aim, BHK UK and TATL discussed general as well as customer specific prices.[192]

5.20 During the Relevant Period, BHK UK and TATL cooperated in accordance with the proposals put forward at the Penrith meeting. In support of that conclusion, the CMA has had regard to the following:

(a) witness evidence describing the way in which the agreement worked in practice;[193]

(b) documentary and witness evidence of collaboration and the disclosure of pricing information in respect of customers such as Silentnight, [Customer 1], and Hilding Anders (Slumberland).[194]

5.21 This evidence shows that BHK UK and TATL shared pricing information (including on request), and relied upon that information for the purposes of submitting tactical quotes to customers; or that BHK UK and TATL simply '*backed off*' from each other's customers. By their actions, BHK UK and TATL were in a position to maintain their respective customer bases, and were also

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[190] Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 124. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(xi)].

[191] See paragraph 4.5 of this Decision and the witness statement of [BHK UK employee 1] dated [✂], paragraph 22 URN 12127.

[192] See paragraphs 4.3 to 4.29 of this Decision.

[193] See paragraphs 4.30 to 4.43 of this Decision.

[194] See paragraphs 4.45 to 4.70 of this Decision.

aware that there would be less downward pressure on prices than would otherwise be expected.

5.22 There is no evidence to suggest that BHK UK or TATL expressed any reservations or objections to such collaboration during the Relevant Period. Indeed, the CMA notes that they sometimes alluded to the agreement and/or concerted practice in positive terms in internal minutes and reports.[195]

5.23 Thus, the evidence above demonstrates a concurrence of wills between BHK UK and TATL. They had expressed their joint intention to conduct themselves on the market in a specific way, and had a shared understanding of how they would behave in relation to particular customers. Through their contacts, they knowingly substituted practical cooperation as regards the maintenance of their customer bases for the risks of competition.

5.24 The CMA therefore concludes that there was a concurrence of wills between BHK UK and TATL sufficient to amount to an agreement and/or that they engaged in a concerted practice within the meaning of the Chapter I prohibition and Article 101 TFEU. As discussed in paragraphs 5.76 to 5.85, BHK KG and TAHL are considered to form part of the same undertaking as, and to be jointly and severally liable for the conduct of, their respective subsidiaries.

E. Object of preventing, restricting or distorting competition

Legal principles

5.25 The Chapter I prohibition and Article 101 TFEU prohibit agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition. The term 'object' in this regard refers to the 'aim', 'purpose', or 'objective' of the coordination between the undertakings in question. The Court of Justice has held that agreements and concerted practices that have the object of preventing, restricting or distorting competition are those forms of coordination between undertakings that can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.[196]

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[195] See paragraphs 4.71 to 4.80 of this Decision.

[196] Judgment of 14 March 2013, *Allianz Hungária Biztosító* and Others, C-32/11, EU:C:2013:160, paragraph 35. This has been affirmed in Judgment in *Groupement des cartes bancaires and Europay International v*

5.26 The object of an agreement is to be identified primarily from an examination of objective factors, such as the content of its provisions, its objectives and the legal and economic context of the agreement.[197] When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.[198] Where appropriate, the way in which the coordination (or collusive behaviour) is implemented may be taken into account.[199] The object of an agreement and/or concerted practice is not assessed by reference to the parties' subjective intentions when they enter into it.[200]

5.27 Anti-competitive subjective intentions on the part of the parties can, however, be taken into account in the assessment, but they are not a necessary factor for a finding that the object of the conduct was anti-competitive.[201]

5.28 Where the obvious consequence of an agreement or concerted practice is to prevent, restrict or distort competition, that will be its object for the purpose of

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Commission, joined Cases T-39/92, T-40/92, EU:C:2014:2204, paragraph 50 and Judgment in *MasterCard and Others v Commission*, EU:C:2014:2201, paragraph 185. Both in Judgment in *Groupement des cartes bancaires and Europay International v Commission*, EU:T:1994:20, and Judgment in *MasterCard and Others v Commission*, EU:C:2014:2201, the Court of Justice stated that it is apparent from the case law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (Judgment in *Groupement des cartes bancaires and Europay International v Commission*, EU:T:1994:20, paragraphs 49 and 57; Judgment in *MasterCard and Others v Commission*, EU:C:2014:2201, paragraph 184). It went on to state that that case law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (Judgment in *Groupement des cartes bancaires and Europay International v Commission*, EU:T:1994:20, paragraph 50; Judgment in *MasterCard and Others v Commission*, EU:C:2014:2201, paragraph 185).

[197] Judgment in *Allianz Hungária Biztosító* and Others, EU:C:2013:160, paragraph 36 and Judgment in *Groupement des cartes bancaires and Europay International v Commission*, EU:C:2014:2204, paragraph 53. See also Judgment in Judgment in *GlaxoSmithKline Services Unlimited v Commission*, EU:C:2009:610, paragraph 58; Judgment of 20 November 2008, *Competition Authority v Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraphs 16 and 21; Judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08, EU:C:2011:631, paragraph 136.

[198] Judgment in *Groupement des cartes bancaires and Europay International v Commission*, EU:C:2014:2204, paragraph 53 and Judgment in *Allianz Hungária Biztosító* and Others, EU:C:2013:160, paragraph 36.

[199] *Cityhook Limited v OFT* [2007] CAT 18 ('*Cityhook Limited v OFT*'), at [268] which noted the provisions of paragraph 22 of the Commission Notice: *Guidelines on the application of Article 81(3) of the Treaty* (now Article 101(3) TFEU), OJ C 101/97, 27 April 2004 ('*Article 101(3) Guidelines*'). Paragraph 22 provides that '*the way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect*'.

[200] Judgment of 28 March 1984, *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission*, joined cases 29/83 and 30/83, EU:C:1984:130, paragraphs 25 and 26.

[201] Judgment in *Allianz Hungária Biztosító* and Others, EU:C:2013:160, paragraph 37 and Judgment in *Groupement des cartes bancaires and Europay International v Commission*, EU:C:2014:2204, paragraph 54.

the Chapter I prohibition and Article 101 TFEU, even if the agreement or concerted practice had other objectives.[202]

5.29 The fact that an agreement pursues other legitimate objectives does not preclude it from being regarded as having a restrictive object.[203]

5.30 There is no need to take account of the actual effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition.[204]

Market sharing

5.31 The Chapter I prohibition and Article 101 TFEU both apply, in particular, to agreements or concerted practices which '*share markets or sources of supply*'.[205]

5.32 Businesses may agree to share markets in a number of different ways. The European Commission and European Courts have found market sharing through the allocation of customers on the basis of existing commercial relationships to be a restriction of competition by object.[206] For example, in the *Pre-Insulated Pipe* case, a market sharing agreement by suppliers to respect each other's '*existing'* customer relationships was found by the European Commission to restrict competition by its very nature.[207] For each supply contract, the existing supplier would inform other participants in the arrangement of the price they intended to quote, and the other suppliers would quote higher prices to ensure the maintenance of the existing customer

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[202] For example, Judgment of 8 November 1983, *NV IAZ International Belgium and others v Commission of the European Communities*, joined cases 96-102, 104, 105, 108 and 110/82, EU:C:1983:310*,* paragraphs 22 to 25.
[203] Judgment in *Competition Authority v Beef Industry Development Society and Barry Brothers*, EU:C:2008:643*,* paragraph 21. See also Judgment in *Groupement des cartes bancaires and Europay International v Commission*, EU:C:2014:2204*,* paragraph 70.
[204] Judgment of 13 July 1966, *Consten and Grundig v Commission*, C-58/64 (joined Cases C-56/64, C-58/64), EU:C:1966:41, paragraph 342. See also *Cityhook Limited v OFT*, at [269].
[205] Article 101(1)(c); and section 2(2)(c) of the Act.
[206] Commission Decision 83/546/EEC of 17 October 1983 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.064 – *Cast iron and steel rolls*) [1984] 11 CMLR 694; Commission Decision 86/399/EEC of 10 July 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.371 – *Roofing Felt*) (OJ 1991 L 232/15) and Commission Decision 2002/759/EC of 5 December 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/37.800/F3 – *Luxembourg Brewers)* (OJ 2002 L 253/21) (appeals dismissed in Judgment of 27 July 2005, *Brasserie Battin v Commission*, T-51/02 (joined cases T-49/02, T-50/02, T-51/02), EU:T:2005:298).
[207] Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EEC Treaty (Case No IV/35.691/E-4 – *Pre-Insulated Pipe Cartel)* (OJ 1999 L 24/1). See also Commission Decision 2005/566/EC of 9 December 2004 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No C.37.533 – *Choline Chloride*) (OJ 2005 L 190/22).

relationship. The mechanism whereby participants quote elevated prices so as to avoid drawing customers away from agreed supply relationships is a common method of market sharing by customer allocation.[208]

5.33 It is also well established that such a mechanism amounts to an infringement of the Chapter I prohibition. For example, in *West Midland Roofing Contractors*[209] the OFT concluded that cover pricing (also referred to as collusive tendering or bid-rigging) amounted to an infringement of the Chapter I prohibition. The OFT described cover pricing as arising when a supplier/bidder submits a price for a contract that is not intended to win the contract; rather it is a price that has been decided upon in conjunction with another supplier/bidder that wishes to win the contract.

Price fixing and the sharing of competitively sensitive information

5.34 The Chapter I prohibition and Article 101 TFEU apply to agreements or concerted practices which '*directly or indirectly fix purchase or selling prices or any other trading conditions*'.[210]

5.35 There are many ways in which prices can be fixed. Price fixing may involve fixing either the price itself or the components of a price, setting a minimum price below which prices are not to be reduced, establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move. Price fixing may also take the form of an agreement to restrict or dampen price competition, and an agreement may restrict price competition even if it does not entirely eliminate it.[211]

5.36 The European Commission has previously found that pre-pricing communications discussing factors relevant for setting future prices have the object of reducing uncertainty as to the conduct of the parties with regard to the prices to be set by them, and that such communications concerned the

[208] Commission Decision 2005/566/EC of 9 December 2004 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No C.37.533 – *Choline Chloride*) (OJ 2005 L 190/22).
[209] *West Midland Roofing Contractors*, OFT decision of 17 March 2004. See also *Apex Asphalt and Paving Co Ltd v OFT* [2005] CAT 4
[210] Article 101(1)(a) TFEU; section 2(2)(a) of the Act.
[211] *Guidance on Agreements and Concerted Practices*, paragraphs 3.5 and 3.6.

fixing of prices.[212] This will also include an arrangement not to quote a price without consulting potential competitors.[213]

5.37 The CMA considers that agreements and concerted practices which fix prices have as their object the prevention, restriction or distortion of competition.[214]

5.38 The European Courts and the European Commission have held on numerous occasions that agreements or concerted practices which involve the sharing amongst competitors of pricing or other information of commercial or strategic significance restrict competition by object.[215]

5.39 The Court of Justice has therefore held that the exchange of information between competitors is liable to be incompatible with Article 101 TFEU (and EU Member States' equivalent national competition laws) if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted.[216] In particular, an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anti-competitive object.[217]

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[212] Commission Decision of 15 October 2008, *Bananas,* Case COMP/39.188, upheld in Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, and Judgment of 24 June 2015, *Fresh Del Monte Produce v Commission and Commission / Fresh Del Monte Produce*, C-293/13 P, EU:C:2015:416. In addition, the Commission Notice: *Guidelines on the applicability of Article 101 of the Treaty of the Functioning of the European Union to horizontal co-operation agreements,* OJ C 11/1, 14 January 2011 (the '*Horizontal Cooperation Agreements Guidelines*') notes that *"private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities"*, paragraph 74.

[213] Commission Decision 83/546/EEC of 17 October 1983 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.064 – *Cast iron and steel rolls*) [1984] 11 CMLR 694.

[214] *Guidance on Agreements and Concerted Practices*, paragraphs 3.4 to 3.8. For example, Judgment of 30 January 1985, B*ureau national interprofessionnel du cognac v Guy Clair*, C-123/83, EU:C:1985:33, paragraph 22; and Judgment of 19 April 1988, *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, C-27/87, EU:C:1988:183, paragraph 15. See also Judgment of 10 March 1992, *Montedipe SpA v Commission*, T-14/89, EU:T:1992:36, paragraphs 246 and 265; and Judgment of 6 April 1995, *Tréfilunion v Commission*, T-148/89, EU:T:1995:68, paragraphs 101 and 109.

[215] See for example: Judgment in *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraphs 113 to 127; Judgment in *T-Mobile Netherlands and Others*, EU:C:2009:343. See also *Horizontal Cooperation Agreements Guidelines*; and *Article 101(3) Guidelines*, paragraph 72 to74.

[216] Judgment in *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraph 121; Judgment of 11 March 1999, *Thyssen Stahl v Commission*, C-194/99 P, EU:C:2003:527, paragraph 81; Judgment in *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 35.

[217] Judgment in *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraph 122; Judgment in T-Mobile Netherlands and Others, EU:C:2009:343, paragraph 41.

Application to the Infringement

5.40 The CMA finds that the Infringement took the form of market sharing and the coordination of commercial behaviour (in particular pricing practices) through bid rigging and the exchange of confidential, competitively sensitive information by BHK UK and TATL, during the course of the Relevant Period, with the object of dividing the market for the supply of drawer wraps through the allocation of customers and avoiding competition on price, thereby reducing customer choice. The CMA considers that these contacts can be regarded, by their nature, as being injurious to the proper functioning of normal competition.

5.41 Section 3 describes the economic context in which these practices took place, and paragraphs 5.3 to 5.39 above describe the relevant legal principles establishing that certain forms of conduct amount to infringements of the Chapter I prohibition and/or Article 101 TFEU. As set out in Section 4, the evidence shows that BHK UK and TATL exchanged information on, and agreed that they would *'back off'* from, each other's customers; on occasion they shared pricing information for the purposes of submitting tactical quotes to customers. The pricing information exchanged was competitively sensitive information that one would expect to be kept secret. By their actions, BHK UK and TATL were in a position to maintain their respective customer bases; and were also aware that there would be less downward pressure on prices than would otherwise be expected.

5.42 The CMA considers that the objective aim of the agreement and/or concerted practice is supported by evidence of BHK UK's and TATL's subjective intentions. The evidence cited in Section 4, and in particular at paragraphs 4.6 to 4.10, clearly demonstrates the existence and expression of the parties' subjective intention to maintain their existing customer bases.

5.43 During the course of the CMA's investigation it was suggested to the CMA that the conduct was not intended to benefit BHK UK or TATL, but that it was intended to benefit customers; or that the conduct was entered into in order to enable companies to trade successfully during difficult times.[218] However, having regard to the principles set out in paragraphs 5.26 to 5.29 above, such arguments are not relevant for the purposes of assessing the 'object' of the

[218] For example, see transcript of an interview with [TATL senior employee 1] on [✂], point 32, page 18; point 41, page 22; point 93, page 41.

agreement and/or concerted practice. Moreover, cartel activity is not an acceptable response to difficult economic times.

5.44 In line with the principles set out in paragraphs 5.31 to 5.39 above, the CMA considers that each of the practices identified above, namely the sharing of markets through the allocation of customers and the coordination of commercial behaviour (in particular pricing practices) through bid-rigging and the exchange of competitively sensitive information, of itself constitutes an obvious restriction of competition and thus also has as its object the prevention, restriction or distortion of competition. Such conduct can be regarded, by its very nature, as being injurious to the proper functioning of normal competition.

5.45 It follows that, for the purposes of establishing an infringement of the Chapter I prohibition and/or Article 101 TFEU in the present case, there is no need for the CMA to show that the agreement and/or concerted practice had an anti-competitive effect.

F. Single and continuous infringement

Legal principles

5.46 Where two or more undertakings engage in a series of anti-competitive actions in pursuit of a common objective or objectives, it is not necessary to divide the conduct by treating it as consisting of a number of separate infringements where there is sufficient consensus to adhere to a plan in pursuit of a single economic aim.[219] Nor is the characterisation of a complex cartel as a single and continuous infringement affected by the possibility that one or more elements of a series of actions, or of a continuous course of conduct, could individually and in themselves constitute infringements.[220]

5.47 Agreements and/or concerted practices may constitute a single continuous infringement notwithstanding that they vary in intensity and effectiveness, or even if the arrangement in question is suspended during a short period.[221]

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[219] Judgment in *Rhône-Poulenc v Commission*, EU:T:1991:56, paragraph 126.
[220] Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraphs 111 to 114. See also Commission Decision of 10 December 2003, *Organic peroxides,* Case COMP/E-2/37.857, paragraph 308.
[221] Judgment of 20 March 2002, *LR AF 1998 v Commission*, T-23/99, EU:T:2002:75, paragraphs 106-109.

5.48 When establishing that an undertaking was involved in a single continuous infringement it is necessary to show that: '… *the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk'*.[222]

Application to the Infringement

5.49 The CMA finds that the conduct of BHK UK and TATL constitutes a number of anti-competitive contacts in pursuit of a common objective, namely to divide the market for the supply of drawer wraps through the allocation of customers, and to maintain each other's existing customer base, in order to avoid having to compete for business (for example by lowering prices). This occurred by identifying customers that would be 'reserved' to each party, a shared understanding of how they would each behave in relation to the other's customers, and included, on occasion, the disclosure of pricing information for the purposes of enabling each other to submit so-called 'tactical quotes', during the Relevant Period.

5.50 The CMA therefore finds that BHK UK and TATL participated in a single, continuous infringement lasting from April 2006 to September 2008 and that, as discussed in paragraphs 5.76 to 5.85, they each form part of the same undertakings as their respective parent companies, BHK KG and TAHL, which the CMA finds jointly and severally liable for the infringing conduct of their respective subsidiaries.

5.51 Having regard to the principles set out at paragraph 5.47 above, the CMA considers there to have been a single continuous infringement, notwithstanding that there may have been occasions on which one of the parties sought to circumvent the agreement and/or concerted practice.[223]

5.52 The CMA considers that its findings as regards BHK UK's and TATL's conduct is supported by a consistent body of witness and contemporaneous documentary evidence throughout the Relevant Period.[224]

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[222] Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 87.

[223] See, for example, paragraphs 4.64 to 4.65, 4.75 to 4.76, 4.78 and 4.79 of this Decision.

[224] See paragraphs 4.3 to 4.81 of this Decision.

G. Appreciable restriction of competition

Legal principles

5.53 An agreement and/or concerted practice will only infringe the Chapter I prohibition and/or Article 101 TFEU if it has as its object or effect the appreciable prevention, restriction or distortion of competition[225] within the UK or a part of it, or within the EU internal market, respectively.

5.54 The Court of Justice has clarified that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.[226] In accordance with section 60(2) of the Act,[227] this principle also applies *mutatis mutandis* in respect of the Chapter I prohibition: accordingly, an agreement that may affect trade within the UK and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.

Application to the Infringement

5.55 As set out in paragraph 5.44 above, the CMA has concluded that the agreement and/or concerted practice between BHK UK and TATL had the object of preventing, restricting or distorting competition by the sharing of markets for drawer wraps through the allocation of customers and the coordination of commercial behaviour (in particular pricing practices) through bid-rigging and the exchange of competitively sensitive information.

5.56 As set out in paragraphs 5.61 to 5.63 below, the CMA finds that the agreement and/or concerted practice may affect trade within the UK – in particular the agreement and/or concerted practice applied to the whole of the UK market for drawer wraps.

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[225] It is settled case law that an agreement between undertakings falls outside the prohibition in Article 101(1) TFEU if it has only an insignificant effect on the market: see Judgment of 13 December 2012, *Expedia Inc. v Autorité de la concurrence and Others*, C-226/11, EU:C:2012:795, paragraph 16.

[226] Judgement in *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 37; and Commission Notice on agreements of minor importance [2014] OJ C291/01, paragraphs 2 and 13.

[227] Section 60(2) of the Act provides that, when determining a question in relation to the application of Part 1 of the Act (which includes the Chapter I prohibition), the court (and the CMA) must act with a view to securing that there is no inconsistency with any relevant decision of the European Court in respect of any corresponding question arising in EU law. See also *Carewatch and Care Services Limited v Focus Caring Services Limited and Others* [2014] EWHC 2313 (Ch), paragraphs 148ff.

5.57 As set out in paragraphs 5.67 to 5.70 below, the CMA finds that the agreement and/or concerted practice may affect trade between Member States.

5.58 Therefore, the CMA has concluded that the agreement and/or concerted practice constitutes, by its nature, an appreciable restriction of competition.

H. Effect on trade within the United Kingdom

Legal principles

5.59 The Chapter I prohibition applies to agreements and/or concerted practices which '…*may affect trade within the United Kingdom*'.[228]

5.60 As regards the question of whether the effect on trade within the UK should be appreciable, the Competition Appeal Tribunal (CAT) has held in one case that there is no need to import into the Act the rule of '*appreciability'* under EU law, the essential purpose of which is to demarcate the fields of EU law and UK domestic law respectively.[229] In a subsequent case, the CAT held that it was not necessary to reach a conclusion on that question.[230]

Application to the Infringement

5.61 The CMA considers that, by its very nature, an agreement and/or concerted practice between competitors to share markets and exchange competitively sensitive information in relation to the supply of drawer wraps is likely to affect trade within the UK.

5.62 The CMA also notes that drawer wraps were supplied by BHK UK and TATL to customers based across the whole of the UK, and that the agreement and/or concerted practice operated at the national level.[231] Thus the agreement and/or concerted practice was at the very least capable of altering

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[228] By virtue of section 2(1)(a) of the Act. For the purposes of the Chapter I prohibition, the United Kingdom includes any part of the UK where an agreement and/or concerted practice operates or is intended to operate.
[229] Aberdeen Journals v Director of Fair Trading [2003] CAT 11 at [459] to [461].
[230] *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14 at [48] to [51] and [62]. The CAT stated that it was not necessary to reach a conclusion on the question whether the appreciability requirement extends to the effect on UK trade test as, at least in that case, there was a close nexus between appreciable effect on competition and appreciable effect on trade within the UK, in that if one was satisfied, the other was likely to be so.
[231] See paragraphs 3.24 to 3.27 of this Decision.

the structure of competition within the UK by reducing competition in the supply of drawer wraps, thus altering the pattern of trade within the UK.

5.63 The CMA therefore finds that the requirement, within the meaning of the Chapter I prohibition, that an agreement and/or concerted practice may have an effect on trade within the UK, is satisfied in this case.

I. Effect on trade between EU member states

Legal principles

5.64 Article 101(1) applies where an agreement and/or concerted practice has the potential to affect trade between EU Member States. Such an effect on trade must be appreciable.

5.65 An effect on trade means that the agreement, decision or concerted practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between EU Member States.[232] In this context, the concept of '*effect on trade*' has a wide scope and is not limited to exchanges of goods and services across borders.[233]

5.66 Trade between Member States may be affected notwithstanding that the relevant market may be national or sub-national in scope.[234] Moreover, horizontal cartels covering a whole Member State are normally capable of affecting trade between Member States.[235] The EU Courts have held in a number of cases that '*an agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about*'.[236]

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[232] First stated in Judgment of 30 June 1966, *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)*, C-56/65, EU:C:1966:38, p.249. See further, for example*, van Landewyck* (fn523), paragraph 12; Judgment of 11 July 1985, *Remia BV and others v Commission of the European Communities*, C-42/84, EU:C:1985:327, paragraph 22. See also Commission Notice (EC) Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C101/07) (the '*Notice on the Effect on Trade'*), paragraph 24.

[233] Judgment in *Züchner v Bayerische Vereinsbank*, EU:C:1981:178, paragraph 18; and see the Notice on the Effect on Trade, paragraph 19.

[234] *Effect on Trade Guidelines*, paragraph 22.

[235] *Effect on Trade Guidelines*, paragraphs 78 to 80.

[236] Judgment of 19 February 2002, *Wouters and Others*, C-309/99, EU:C:2002:98, paragraph 95. See also the *Effect on Trade Guidelines*, paragraph 78. For the purposes of assessing whether an agreement and/or

Application to the Infringement

5.67 The CMA finds that the Infringement may give rise to an effect on trade between Member States to an appreciable extent. The CMA is therefore under a duty to apply Article 101 TFEU to the Infringement.

5.68 The CMA finds that BHK UK and TATL have engaged in market sharing (including bid rigging) and the sharing of confidential, competitively sensitive information. Such conduct amounts to a horizontal cartel within the meaning of paragraphs 78 to 80 of the *Effect on Trade Guidelines.* The CMA further finds that the relevant market covers the whole territory of the UK.[237] As noted above, horizontal cartels extending over the whole of a Member State are normally capable of affecting trade between Member States.

5.69 In addition, there are international aspects to the supply of drawer wraps.[238] It is noted, in particular, that during the Relevant Period, TATL supplied drawer wraps in single components to the Republic of Ireland; that BHK UK supplied products to its German parent company in a limited set of circumstances; and that there was at least some, albeit limited, competition from a number of non-UK businesses, including from companies in Belgium and Denmark.[239]

5.70 As regards appreciability, it is noted that BHK UK and TATL are the only independent manufacturers of drawer wraps in the UK.[240] Moreover, the CMA finds that BHK UK and TATL sought to share the market and coordinate their commercial conduct at a national level.

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concerted practice may affect trade between EU Member States to an appreciable extent the CMA follows the approach set out in the European Commission's published guidance.

[237] See paragraphs 3.24 to 3.27 of this Decision.

[238] See paragraphs 3.18 to 3.22 of this Decision.

[239] BHK UK's response dated 20 May 2016 (as amended) to the CMA's information request dated 30 March 2016, questions 3, 6 and 7 URN H0105; TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, questions 3, 6 and 7 URN H0036.

[240]See paragraph 2.7 of this Decision. The Commission quantifies in paragraph 52 of the Effect on Trade Guidelines, with the help of the combination of a 5 per cent market share threshold and a EUR 40 million turnover threshold, which agreements, decisions and concerted practices are in principle not capable of appreciably affecting trade between Member States. See also the Commission's Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (2014/C 291/01) ('De Minimis Notice'), paragraph 4.

J. Duration

5.71 The duration of the Infringement is a relevant factor for determining any financial penalties that the CMA may decide to impose in the event of a finding of infringement (see paragraphs 6.24 to 6.25 below).

5.72 The CMA finds that the agreement and/or concerted practice was entered into on 6 April 2006 and continued until September 2008. The duration of the Infringement was, therefore, approximately two years and six months.

K. Exemptions and exclusions

5.73 The Parties have not sought to prove that the arrangements entered into are exempted from the Chapter I prohibition by operation of section 9 of the Act, or from Article 101 by the operation of Article 101(3) TFEU.

5.74 Notwithstanding that the burden of proving that the conditions for exemption under section 9 of the Act or Article 101(3) TFEU would rest with the Parties, the CMA considers it unlikely that the conditions would be met in this case. Agreements which have as their object the prevention, restriction or distortion of competition, are unlikely to benefit from individual exemption as such restrictions generally fail (at least) the first two conditions for exemption: they neither create objective economic benefits, nor do they benefit consumers. Moreover, such agreements generally also fail the third condition (indispensability).[241] However, each case ultimately falls to be assessed on its merits.

5.75 In addition, the CMA finds that none of the exclusions from the Chapter I prohibition provided for by section 3 of the Act apply.

L. Attribution of liability

Identification of the appropriate legal entity

5.76 For each Party which the CMA finds has infringed the Act and/or Article 101 TFEU, the CMA has first identified the legal entity directly involved in the Infringement. It has then determined whether liability for the Infringement

[241] Article 101(3) Guidelines, paragraph 46.

should be shared with another legal entity forming part of the same undertaking, in which case each legal entity's liability will be joint and several.

5.77 The conduct of a subsidiary undertaking[242] may be imputed to its parent company where, although having a separate legal personality, the subsidiary did not decide independently upon its conduct on the market, but carried out, in all material respects, the instructions of its parent company.[243] Where a subsidiary is wholly owned by its parent company, the CMA is entitled to presume that the parent exercised decisive influence over the commercial policy of the subsidiary; this presumption also applies if ownership of the subsidiary is just below 100 per cent.[244] It is for the parent company in question to rebut the presumption by adducing sufficient evidence to demonstrate that the subsidiary company acted independently on the market.[245]

5.78 Where a parent company is able to exercise decisive influence over the conduct of a subsidiary, and does in fact exercise such decisive influence, the conduct of a subsidiary may be imputed to its parent company (with joint and several liability for the subsidiary and its parent). In such circumstances, the parent company and its subsidiary form a single economic unit and, therefore, the same undertaking, for the purpose of applying the Chapter I prohibition and Article 101 TFEU. [246]

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[242] Judgment in *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 55.
[243] Judgment in *ICI v Commission*, EU:C:1972:70, paragraphs 132 and 133; Judgment in *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 58.
[244] Judgment in *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraphs 60 and 61; Judgment in -174/05 *Elf Aquitaine v Commission*, EU:T:2009:368, paragraphs 153 to 157 (where the presumption was held to apply inrelation to a shareholding of approximately 98 per cent); Judgment T-217/06 *Arkema France and Others v Commission*, EU:T:2011:251 at paragraph 53; Judgment of 27 October 2010, *Alliance One International and Others v Commission*, T-24/05, EU:T:2010:453, paragraphs 126-130. The GC has indicated, among other things, that neither the fact that the subsidiary operates independently in specific aspects of its policy on the marketing of the products concerned by the infringement, nor the lack of any direct involvement in, or knowledge of the facts alleged to constitute, the infringement by directors of the parent company, are sufficient, of themselves, to rebut the presumption. Judgment of 14 July 2011, *Total and Elf Aquitaine v Commission*, T-190/06, EU:T:2011:378, paragraph 64; Judgment of 14 July 2011, *Arkema France v Commission*, T-189/06, EU:T:2011:377, paragraph 65.
[245] Judgment of 27 November 2014, *Alstom v European Commission*, T-517/09, EU:T:2014:999, paragraph 55; Judgment in *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 61; Judgment in *Alliance One International and Others v Commission*, EU:T:2010:453, paragraph 130.
[246] Judgment in *Alstom v European Commission*, EU:T:2014:999, paragraph 55; Judgment in *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 59.

5.79 Where a Party which was directly involved in an Infringement was owned by natural persons during the Relevant Period, liability for the Infringement will not extend to those individuals.

Application to the Parties

BHK

5.80 The CMA finds that BHK UK was directly involved in, and is therefore liable for, the Infringement.

5.81 The CMA finds that BHK KG is jointly and severally liable with BHK UK for the Infringement. BHK KG holds a 99.99 per cent shareholding in BHK UK and did so throughout the Relevant Period;[247] it can therefore be presumed to have exercised a decisive influence over BHK UK during the Relevant Period, and to form part of the same undertaking.

5.82 This Decision is therefore addressed to BHK UK and BHK KG (together BKH).

TA

5.83 The CMA finds that TATL was directly involved in, and is therefore liable for, the Infringement.

5.84 The CMA finds that TAHL is jointly and severally liable with TATL for the Infringement. TAHL holds a 99.95 per cent shareholding in TATL and did so throughout the Relevant Period;[248] it can therefore be presumed to have exercised a decisive influence over TATL during the Relevant Period, and to form part of the same undertaking.

5.85 This Decision is therefore addressed to TATL and TAHL (together TA).

[247] See paragraph 2.11 of this Decision.
[248] See paragraph 2.18 of this Decision.

6. THE CMA'S ACTION

A. The CMA's decision

6.1 On the basis of the evidence set out in this Decision, the CMA finds that between April 2006 and September 2008, BHK and TA infringed the Chapter I prohibition and/or Article 101 TFEU by participating in a single continuous infringement through an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of drawer wraps to customers in the UK.

B. Attribution of liability

6.2 As set out in paragraphs 5.80 to 5.85 above, the CMA finds BHK and TA liable for the Infringement.

C. Directions

6.3 Section 32(1) of the Act provides that if the CMA has made a decision that an agreement infringes the Chapter I prohibition or Article 101, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.

6.4 As the CMA considers that the Infringement has already come to an end it is not issuing directions in this case.

D. Financial penalties

6.5 Section 36(1) of the Act provides that on making a decision that an agreement has infringed the Chapter I prohibition and/or Article 101 TFEU, the CMA may require an undertaking which is party to the agreement concerned to pay the CMA a penalty in respect of the infringement. In accordance with section 38(8) of the Act, the CMA must have regard to the guidance on penalties in force at the time when setting the amount of the penalty (the 'Penalties Guidance').[249]

[249] *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board.

6.6 The CMA considers that it would be appropriate to impose a penalty on TA for the Infringement. TA has agreed as part of settlement to accept a maximum penalty of £1,509,000.

6.7 BHK admitted its involvement in the Infringement shortly after the start of the CMA's criminal investigation and applied to the CMA for leniency under the CMA's leniency policy. Provided BHK continues to co-operate and comply with the conditions of the CMA's leniency policy, as set out in the immunity agreement between BHK and the CMA dated 26 October 2016, no financial penalty will be imposed on it. Consequently, the CMA has not calculated the level of any financial penalty that would be applied to BHK if immunity had not been granted.

The CMA's margin of appreciation in determining the appropriate penalty

6.8 Provided the penalties it imposes in a particular case are (i) within the range of penalties permitted by section 36(8) of the Act and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the '2000 Order'),[250] and (ii) the CMA has had regard to the Penalties Guidance in accordance with section 38(8) of the Act, the CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Act.[251] The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.[252] Rather, the CMA makes its assessment on a case-by-case basis,[253] having regard to all relevant circumstances and the objectives of its policy on financial penalties. In line with statutory requirements and the twin objectives of its policy on financial penalties, the CMA will also have regard to the seriousness of the infringement and the desirability of deterring both the undertaking on which the penalty is imposed and other undertakings from engaging in behaviour

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[250] SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

[251] *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at [102].

[252] See, for example, *Eden Brown and Others v OFT* [2011] CAT 8 *(Eden Brown*), at [78].

[253] See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at [116] where the CAT noted that *'other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent*'. See also *Eden Brown*, at [97] where the CAT observed that *'[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case'*.

that breaches the prohibition in Chapter I of the Act (as well as other prohibitions under the Act and the TFEU as the case may be).[254]

Small agreements

6.9 The CMA considers that section 39 of the Act (which provides for limited immunity from penalties in relation to the Chapter I prohibition) does not apply in the present case on the basis that the combined turnover of the Parties exceeds £20 million and, in any event, the Infringement amounts to a 'price fixing agreement' within the meaning of section 39(9) of the Act.[255] Section 39 does not apply in respect of infringements of Article 101 TFEU.

Intention/negligence

6.10 The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition or Article 101 TFEU only if it is satisfied that the infringement has been committed intentionally or negligently.[256] However, the CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent.[257]

6.11 The CAT has defined the terms '*intentionally'* and '*negligently'* as follows:

'*…an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition*'.[258]

6.12 This is consistent with the approach taken by the Court of Justice, which has confirmed:

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[254] Section 36(7A) of the Act and Penalties Guidance, paragraph 1.4.
[255] A '*price fixing agreement*' within the meaning of section 39(9) of the Act is '*an agreement which has as its object or effect, or one of is objects or effects, restricting the freedom of a party to the agreement to determine the price to be charged (otherwise than as between that party and another party to the agreement) for the product, service or other matter to which the agreement relates*'. By virtue of section 39(1)(b) of the Act, such an agreement is excluded from the benefit of the limited immunity from penalties provided by section 39 of the Act.
[256] Section 36(3) of the Act.
[257] *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraphs [453] to [457]; see also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [221].
[258] *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at 221.

'*the question whether the infringements were committed intentionally or negligently…is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty*'.[259]

6.13 The circumstances in which the CMA might find that an infringement has been committed intentionally include the situation in which the agreement and/or concerted practice or conduct in question has as its object the restriction of competition.[260]

6.14 Ignorance or a mistake of law does not prevent a finding of intentional infringement.[261]

6.15 For the reasons set out at paragraphs 5.40 to 5.45 above, the CMA finds that the Infringement had as its object the prevention, restriction or distortion of competition, and that the parties must therefore have been aware (or could not have been unaware), and at the very least ought to have known, that their conduct was capable of harming competition. The CMA therefore concludes that the infringement was committed intentionally or, at the very least, negligently.

Calculation of penalty

6.16 The Penalties Guidance sets out a six-step approach for calculating the penalty.

Step 1 – starting point

6.17 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regard to the relevant turnover of the undertaking and the seriousness of the infringement.[262]

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[259] Judgment of 14 October 2010 in *Deutsche Telekom v Commission*, C-2080/08P, EU:C:2010:603, paragraph 124.

[260] See *OFT's Guidance on Competition law application and Enforcement* (OFT407, December 2004), adopted by the CMA Board ('Guidance on Enforcement'), paragraph 5.9.

[261] See Judgment of 18 June 2013 in *Bundeswettbewerbsbehörde v Schenker & Co AG,* C-681/11, EU:C:2013:404, paragraph 38: '*the fact that the undertaking concerned has characterised wrongly in law its conduct upon which the finding of the infringement is based cannot have the effect of exempting it from imposition of a fine in so far as it could not be unaware of the anti-competitive nature of that conduct*'. See also *Guidance on Enforcement*, paragraph 5.10.

[262] Penalties Guidance, paragraphs 2.3 to 2.11.

- *Relevant turnover*

6.18 The 'relevant turnover' is the turnover of the undertaking in the relevant market affected by the infringement in the undertaking's last business year.[263] The 'last business year' is the undertaking's financial year preceding the date when the infringement ended.[264]

6.19 In the present case, the 'last business year' of TA is the financial year ending 30 September 2007, which results in a relevant turnover of £2,695,689.

- *Seriousness of the infringement*

6.20 In order to reflect adequately the seriousness of an infringement, the CMA will apply a starting point of up to 30 per cent of the undertaking's relevant turnover.[265] The actual percentage which is applied to the relevant turnover depends, in particular, upon the nature of the infringement. The more serious and widespread the infringement, the higher the likely percentage rate.[266] When making its assessment of the seriousness of the infringement, the CMA will consider a number of factors.[267] The CMA will use a starting point towards the upper end of the range for the most serious infringements of competition law, including hardcore cartel activity.[268] The CMA will also take into account the need to deter other undertakings from engaging in such infringements in the future. The assessment is made on a case-by-case basis, taking account of all the circumstances of the case.[269]

6.21 In assessing the seriousness of the Infringement, taking account of the principles set out in the previous paragraph, the CMA considers that, on the one hand, the following factors point to a starting point towards the upper end of the range:

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[263] Penalties Guidance, paragraph 2.7. The CMA notes the observation of the Court of Appeal in *Argos Ltd and Littlewoods Ltd v Office of Fair Trading and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, at paragraph 169 that: '*[ ] neither at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty*.' The Court of Appeal considered that it was sufficient for the OFT to '*be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement*' (at paragraphs 170 to 173).

[264] Penalties Guidance, paragraph 2.7.

[265] Penalties Guidance, paragraph 2.5.

[266] Penalties Guidance, paragraph 2.4.

[267] In accordance with paragraph 2.6 of the Penalties Guidance, these factors include the nature of the product, the structure of the market, the market shares of the undertakings involved in the infringement, entry conditions and the effect on competitors and third parties. The CMA may also take into account other relevant factors.

[268] Penalties Guidance, paragraph 2.5.

[269] Penalties Guidance, paragraph 2.6.

(a) the Infringement involved the most serious type of cartel behaviour: market sharing and the coordination of commercial behaviour (in particular pricing practices) through bid rigging and the exchange of confidential, competitively sensitive information, with the object of dividing the market based on customer type and avoiding competition on price, thereby reducing customer choice;

(b) the conduct was carried out across the whole of the UK; as a consequence, it had the potential to affect UK and interstate trade;

(c) the Infringement involved the only two independent manufacturers of drawer wraps in the UK and, therefore, there were limited alternative suppliers available to customers;

(d) a lower starting point would send the wrong message in terms of general deterrence, particularly given the need to provide general deterrence in respect of infringements that by their very nature are likely to cause harm.

6.22 On the other hand, the CMA has also taken account of the potentially limited impact of the conduct on consumers, given the relatively low value of the cartelised products.

6.23 Taking the above factors in the round,[270] the CMA considers that the starting point for the Infringement should be at the high (but not the highest) end of the range, and in the circumstances it considers that it is appropriate to apply as a starting point 28 per cent of TA's relevant turnover. Applying 28 per cent to TA's relevant turnover of £2,695,689 results in a penalty of £754,793 at step 1.

Step 2 – adjustment for duration

6.24 The starting point under step 1 may be increased, or in particular circumstances decreased, to take into account the duration of an infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement.[271] Part years may be treated as full years for the purposes of calculating the number of years of the infringement. Where the total duration of an infringement is less than one year, the CMA will treat that duration as a full year for the purpose of calculating the number of years of the

[270] The CMA has taken account of the evidence relating to these factors set out in sections 3, 5H and 5I above.
[271] Penalties Guidance, paragraph 2.12.

infringement; in exceptional circumstances, the starting point may be decreased where the duration of the infringement is less than one year.[272] Where the duration of an infringement is more than one year, the CMA will usually round up to the nearest quarter year.[273]

6.25 The CMA has applied a multiplier of 2.5 to the starting point to take account of the duration of the Infringement, namely from 6 April 2006 to September 2008, which amounts to approximately two years and six months. Applying this multiplier results in a penalty of £1,886,982 at step 2.

Step 3 – adjustment for aggravating and mitigating factors

6.26 The amount of the penalty, adjusted as appropriate at step 2, may be increased where there are aggravating factors, or reduced where there are mitigating factors. A non-exhaustive list of aggravating and mitigating factors is set out in the Penalties Guidance.[274] In the circumstances of this case, the CMA considered at step 3 the factors set out below.

- *Aggravating factor: involvement of directors or senior management*

6.27 The involvement of directors or senior management in an infringement can be an aggravating factor.[275] The CMA has increased the penalty at step 3 by 15 per cent for TA. This is on the basis that the arrangements, which were the most serious kind of infringement, were set up and implemented by [TATL senior employee 1]. The CMA considers that an uplift of 15 per cent is appropriate and proportionate in the circumstances of this case.

- *Mitigating factor: cooperation*

6.28 The CMA may decrease the penalty at step 3 for cooperation which enables the enforcement process to be concluded more effectively and/or speedily. The Penalties Guidance provides that, for these purposes, what is expected is cooperation over and above respecting time limits specified or otherwise agreed (which will be a necessary but not sufficient criterion).[276]

6.29 The CMA considers that it is appropriate to decrease the penalty at step 3 to reflect the fact that the vast majority of witnesses from TATL agreed to

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[272] Penalties Guidance, paragraph 2.12.

[273] Penalties Guidance, paragraph 2.12.

[274] Penalties Guidance, paragraphs 2.13 to 2.15.

[275] Penalties Guidance, paragraph 2.14.

[276] Penalties Guidance, paragraph 2.15 and footnote 28.

provide witness statements following interview, and that these were provided on a voluntary basis. In addition, TATL provided separate legal representation for some of its employees, enabling the CMA to conclude its investigation more quickly than would otherwise have been possible.

6.30 The CMA considers that a 5 per cent reduction for cooperation is appropriate and proportionate in the circumstances of this case.

- *Mitigating factor: compliance*

6.31 The CMA may decrease the penalty at step 3 where an undertaking can show that adequate steps have been taken to ensure compliance with competition law.[277] To qualify, an undertaking has to show evidence of adequate steps taken to achieve a clear and unambiguous commitment to competition law compliance throughout the organisation, from the top down - together with appropriate steps relating to competition compliance risk identification, risk assessment, risk mitigation and review activities. The CMA will consider carefully whether evidence presented of an undertaking's compliance activities in a particular case merits a discount to the penalty of up to 10 per cent.

6.32 TA has provided the CMA with details of its compliance plan and the steps taken to ensure a compliance culture within TA. The CMA considers that TA has provided sufficient evidence of compliance activities, demonstrating a clear and unambiguous commitment to competition law compliance throughout the organisation from the top down, to warrant a reduction in penalty. In particular, TA has:

(a) developed a competition compliance policy, which is provided to every member of staff who may come into contact with other businesses in the course of their employment,

(b) provided the CMA with evidence that senior managers and directors have been trained in competition compliance, and that employees in appropriate roles will receive competition compliance training on a regular basis;

(c) published its compliance plan on its website.[278]

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[277] Penalties Guidance, paragraph 2.15 and footnote 26. See also OFT1341 *How your client's business can achieve compliance with competition law*.

[278] See: http://www.thomasarmstrong.co.uk/-about-us-/our-policies/.

6.33 The CMA therefore considers that a 10 per cent reduction for compliance is appropriate and proportionate in the circumstances of this case. This reduction is granted on the condition that TA provides an annual update to the CMA confirming its ongoing commitment to compliance activities, for the next three years.

6.34 Applying the percentage increase and the percentage decreases for aggravating and mitigating factors, respectively, results in a penalty of £1,886,982 at step 3.

Step 4 – adjustment for specific deterrence and proportionality

6.35 The penalty may be adjusted at this step to achieve the objective of specific deterrence (namely, ensuring that the penalty imposed on the infringing undertaking will deter it from engaging in anti-competitive practices in the future), or to ensure that a penalty is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking as well as any other relevant circumstances of the case.[279] At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round. Adjustment to the penalty at step 4 may result in either an increase or a decrease to the penalty.

6.36 Increases to the penalty figure at step 4 will generally be limited to situations in which an undertaking has a significant proportion of its turnover outside the relevant market, or where the CMA has evidence that the infringing undertaking has made or is likely to make an economic or financial benefit from the infringement that is above the level of the penalty reached at the end of step 3.[280] In considering the appropriate level of uplift for specific deterrence, the CMA will ensure that the uplift does not result in a penalty that is disproportionate or excessive having regard to the infringing undertaking's size and financial position and the nature of the infringement.[281]

6.37 Conversely, where necessary, the penalty may be decreased at step 4 to ensure that the level of penalty is not disproportionate or excessive. In

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[279] Penalties Guidance, paragraph 2.16. The CMA has considered a range of financial indicators in this regard, based on accounting information publicly available and/or provided by TA at the time of calculating the penalty. Those financial indicators included relevant turnover, total worldwide turnover for the last financial year, total worldwide turnover over a three year average, net assets for the last financial year, profit after tax for the last financial year, and profit after tax over a three year average, dividends over a three year average, and TAs management accounts for the three year period ending 30 September 2015.
[280] Penalties Guidance, paragraph 2.17.
[281] Penalties Guidance, paragraph 2.19.

carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the infringing undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking's infringing activity on competition.[282]

6.38 TA's penalty after step 3 is £1,886,982, and the CMA considers that no adjustment is required to this figure at step 4.

6.39 The CMA notes that TA's penalty after step 3 represents approximately:

(a) 1.53 per cent of TA's average annual worldwide turnover (over the three year period ending 30 September 2015);

(b) 1.66 per cent of TA's adjusted net assets;[283]

(c) 25.9 per cent of TA's average annual profit after tax (over the three year period ending 30 September 2015).

6.40 As stated in paragraph 2.47 above, on the same day as this Decision is issued, the CMA is issuing a decision imposing a financial penalty on TA for its participation in the Drawer Front Infringement involving a closely related market.[284] The CMA has therefore taken a step back and carried out a cross check across the two penalties to ensure that, taken together, they would not lead to the imposition of a total penalty across both infringements that is excessive or disproportionate.[285]

6.41 The CMA notes that, when the CMA's penalty for the Infringement at step 4 (£1,886,982) is combined with the CMA's penalty in relation to the Drawer Front Infringement at step 4 (£855,342 (after adjustment)), TA's total penalty at step 4 amounts to £2,742,324, which represents:

(a) 2.23 per cent of TA's average annual worldwide turnover (over the three year period ending 30 September 2015);

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[282] Penalties Guidance, paragraph 2.20.

[283] Being net assets in the financial year ending 30 September 2015, together with dividends paid out in the financial years ending 30 September 2013, 2014 and 2015.

[284] The CMA is imposing a penalty on TA of £684,000 (after settlement discount) for the Drawer Front Infringement.

[285] See *Kier Group and Others v OFT* [2011] CAT 3, at [180] where the CAT noted that, *'In our view, if more than one discrete infringement is being pursued then whatever deterrent element is appropriate for each infringement should be included in the specific penalty for it. This should not result in an excessive overall penalty provided that the 'totality' principle is respected and any necessary adjustments are made to each separate penalty.'*

(b) 2.41 per cent of TA's adjusted net assets;[286]

(c) 37.7 per cent (or approximately 4.5 months) of average annual profit after tax (over the three year period ending 30 September 2015).

6.42 Assessing the penalty for the Infringement in the round and taking into account the penalty for the Drawer Front Infringement, the CMA considers that the penalty of £1,886,982 at step 4 for the Infringement is appropriate and sufficient to ensure deterrence, without being disproportionate or excessive.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

6.43 The CMA may not impose a penalty for an infringement that exceeds 10 per cent of an undertaking's 'applicable turnover', that is the worldwide turnover of the undertaking in the business year preceding the date of the CMA's decision or, if figures are not available for that business year, the one immediately preceding it.[287]

6.44 The CMA has assessed TA's penalty at step 4 against the maximum penalty threshold set out in the preceding paragraph. This assessment has not necessitated any reduction to the penalty at step 5 of the penalty calculation.[288]

6.45 In addition, the CMA must, when setting the amount of a penalty for a particular agreement or conduct, take into account any penalty or fine that has been imposed by the European Commission, or by a court or other body in another EU Member State in respect of the same agreement or conduct.[289] As there is no such applicable penalty or fine, no adjustment is necessary in this case in that regard.

Step 6 – application of reduction for settlement

6.46 The CMA will reduce an undertaking's financial penalty at step 6 where the undertaking has agreed to settle the case with the CMA. This will involve,

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[286] Being net assets in the financial year ending 30 September 2015, together with dividends paid out in the financial years ending 30 September 2013, 2014 and 2015.
[287] Section 36(8) of the Act and the 2000 Order, as amended. See also Penalties Guidance, paragraph 2.21.
[288] The applicable turnover for TA is its worldwide turnover in the financial year ending September 2007, namely £13,480,664. The penalty at step 4, namely £1,886,982, does not exceed 10 per cent of TA's applicable turnover.
[289] Penalties Guidance, paragraph 2.24.

amongst other things, the undertaking admitting its participation in an infringement.[290]

6.47 As set out at paragraph 2.43 above, TA has admitted the facts and allegations of infringement as set out in the draft Statement of Objections dated 6 January 2016, which are now reflected in this Decision. In light of those admissions, and TA's agreement to cooperate in expediting the process for concluding the investigation, the CMA has reduced TA's financial penalty by 20 per cent at step 6 such that the maximum amount payable by TA is £1,509,000[291] (provided that TA also complies with the continuing requirements of settlement).

Payment of penalty

6.48 The following table sets out a summary of the penalty calculation and the penalty that the CMA requires TA to pay in relation to the Infringement:

Step	**Description**		**Adjustment**	**Figure**
	Relevant turnover			**£2,695,689**
1	Starting point as a percentage of relevant turnover		28%	£754,793
2	Adjustment for duration		x 2.5	£1,886,982
3	Adjustment for aggravating or mitigating factors	Aggravating: director's involvement	*15%*	*£283,047*
		Mitigating: cooperation	*-5%*	*-£94,349*
		Mitigating: compliance	*-10%*	*-£188,698*
		Total adjustment		*£0*
		Total penalty after step 3		£1,886,982
4	Adjustment for specific deterrence or proportionality		0%	N/A
5	Adjustment to take account of the statutory maximum penalty		No adjustment necessary	£13,480,664

[290] Penalties Guidance, paragraph 2.26.

[291] The CMA considers it appropriate to round the penalty down to the nearest £1,000 in the circumstances of this case.

			(Statutory cap)
	Total penalty (before settlement)		£1,886,982
	Settlement discount	-20%	£377,396
	Penalty payable		**£1,509,000**[292]

6.49 The penalty will become due to the CMA on 29 May 2017[293] and must be paid to the CMA by close of banking business on that date.[294]

SIGNED:

Stephen Blake, Senior Director - Cartels and Criminal, for and on behalf of the Competition and Markets Authority

[✂]

27 March 2017

[292] The CMA considers it appropriate to round the penalty to £1,509,000 in the circumstances of this case.
[293] The next working day two calendar months from the expected date of receipt of the Decision.
[294] Details of how to pay are set out in the letter accompanying this decision.